APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED DECEMBER 30, 2009

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

07-4027-cv

SUSAN ROSS GREEN,
Executrix of the Estate of Walter Green, deceased,

Plaintiff-Appellant,

-v-

CITY OF NEW YORK and PAUL GIBLIN,

Defendants-Appellees.

December 30, 2009, Decided

JUDGES: Present: ROSEMARY S. POOLER, ROBERT A. KATZMANN, *Circuit Judges*, LORETTA A. PRESKA,* *District Judge*. PRESKA, *District Judge*, dissenting.

---

* The Honorable Loretta A. Preska, United States District Court for the Southern District of New York, sitting by designation.

Appendix A

OPINION

SUMMARY ORDER

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **VACATED** and **REMANDED.**

Plaintiff-appellant Susan Ross Green, executrix of the Estate of Walter Green, appeals from a judgment of the district court in favor of defendant-appellee the City of New York ("City"). This Court had previously affirmed in part and reversed in part the district court's grant of summary judgment in favor of defendants. *Green v. City of New York*, 465 F.3d 65 (2d Cir. 2006) (*Green I*). A jury found that the City had violated Walter Green's rights under the Americans with Disabilities Act, 42 U.S.C.§ 12101, *et seq.*, and the New York State Human Rights Law, N.Y. Executive Law § 290, *et seq.*, and awarded compensatory damages of $400,000. The district court granted the City's motion for judgment as a matter of law against the City pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, or, in the alternative, for a new trial under Rule 59(a) of the Federal Rules of Civil Procedure, or, in the alternative, indicated that it would have set aside the jury's damage award under Rule 59(e) of the Federal Rules of Civil Procedure. *Green v. City of New York*, No. 01 Civ. 1996, 2007 U.S. Dist. LEXIS 65842, 2007 WL 2584752 (S.D.N.Y. Sept. 6, 2007) (*Green II*). We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

Appendix A

This Court reviews a district court's grant of judgment as a matter of law under Rule 50(b) *de novo*. *See, e.g.*, *Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127, 133 (2d Cir. 2008). We have held that, under the law-of-the-case doctrine:

> [W]hen the court of appeals has remanded a case for trial after ruling that summary judgment in favor of a given party was inappropriate because the evidence indicated the existence of genuine issues of material fact to be resolved by the jury, the district court cannot properly, on remand, grant judgment as a matter of law to that party on the basis of trial evidence that is not substantially different.

Kerman v. City of New York, 374 F.3d 93, 110 (2d Cir. 2004). The only difference in the evidence at trial were new opinions stated by the City's medical expert, who was not present at the scene, about post-hoc medical justifications for the City's actions. This objective medical evidence does not speak to the subjective intent inquiry required by the ADA — whether the City denied Walter Green the right to access the City's services for refusing medical treatment based on discriminatory animus in the form of paternalistic stereotypes. *See Green I*, 465 F.3d at 78.[1] Viewing the evidence in the

1. As we held in *Green I*, "defendants *admit* that Walter was a qualified individual" for purposes of the "city's system for evaluating refusals to accept medical assistance." 465 F.3d at 76 (emphasis added).

light most favorable to Green, drawing all reasonable inferences in his favor, and deferring to the jury's credibility determinations, it cannot be said that "there exists such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or the evidence in favor of the [City] is so overwhelming that reasonable and fair minded persons could not arrive at a verdict against it." *Brady*, 531 F.3d at 133 (alterations and quotation marks omitted); *see also Fabri v. United Techs. Int'l, Inc.*, 387 F.3d 109, 119 (2d Cir. 2004). Thus, we vacate the district court's decision insofar as it sets aside the jury's verdict under Rule 50(b).

In the alternative, the district court granted the City's motion for a new trial under Rule 59(a). We review this ruling for abuse of discretion. *Manley v. AmBase Corp.*, 337 F.3d 237, 245 (2d Cir. 2003). It is well-established that in deciding a motion for a new trial, the district court is permitted to "examine the evidence through its own eyes." *Meloff v. New York Life Ins. Co.*, 240 F.3d 138, 147 (2d Cir. 2001). Indeed, the district court can grant such a motion "'even if there is substantial evidence supporting the jury's verdict.'" *Manley*, 337 F.3d at 244 (citations omitted). We nevertheless will reverse a district court's grant of a new trial under Rule 59(a) when "(1) its decision rests on an error of law (such as the application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision — though not necessarily the product of a legal error or a clearly erroneous factual finding — cannot be located within the range of permissible decisions." *Id.* (quotation

marks omitted). We conclude that the district court's decision to grant defendants' Rule 59(a) motion rests on the same legal errors underlying its grant of the Rule 50(b) motion and is inconsistent with this Court's decision in *Green I*. We also conclude that the district court's substitution of its own judgments for that of the jury's "cannot be located within the range of permissible decisions." *Id.*

Finally, the district court ruled that "the award of $400,000 in compensatory damages 'shock[s] the judicial conscience' and deviates 'materially from what would be reasonable compensation,'" but did not recommend either a new damages trial or remittitur because it found that the City had no liability. *Green II*, 2007 U.S. Dist. LEXIS 65842, 2007 WL 2584752, at *13 (citations omitted) (alteration in original). The district court also concluded that "[a]ssuming, arguendo, the Court were to grant a remittitur, only nominal damages would be appropriate." 2007 U.S. Dist. LEXIS 65842, [WL] at *13 n.19. "We review the district court's ruling on a motion to amend the judgment under Rule 59(e) for abuse of discretion." *Schwartz v. Liberty Mut. Ins. Co.*, 539 F.3d 135, 150 (2d Cir. 2008).

In assessing whether a particular award is excessive under either federal or New York law, courts normally look to "other cases involving similar injuries, while bearing in mind that any given judgment depends on a unique set of facts and circumstances." *Nairn v. Nat'l R.R. Passenger Corp.*, 837 F.2d 565, 568 (2d Cir. 1988); *Meacham v. Knolls Atomic Power Lab.*, 381 F.3d 56, 78

(2d Cir. 2004) ("New York law provides that jury verdicts may be set aside and new trials ordered where the jury's award 'deviates materially from what would be reasonable compensation.'" (quoting N.Y.C.P.L.R. Section 5501(c))), vacated on other grounds by *KAPL, Inc. v. Meacham*, 544 U.S. 957, 125 S. Ct. 1731, 161 L. Ed. 2d 596 (2005).

None of the cases offered by plaintiff, all but one of which concern lesser damage awards, is even remotely comparable to this one. *See DiSorbo v. Hoy*, 343 F.3d 172, 175-76 (2d Cir. 2003) (an excessive force case involving "disturbing allegations of police brutality" in which the court reduced $400,000 compensatory damages award to $250,000 and remitted for a new trial on punitive damages); *Mathie v. Fries*, 121 F.3d 808 (2d Cir. 1997) (affirming compensatory damage award of $250,000 where evidence supported finding that defendant sexually abused plaintiff); *Ismail v. Cohen*, 899 F.2d 183 (2d Cir. 1990) (district court erred in issuing remittitur of $650,000 compensatory damage award where defendant knocked plaintiff unconscious, cracked his rib, crushed two of his vertebrae, put a gun to his head, and threatened to kill him); *Broome v. Biondi*, 17 F. Supp. 2d 211 (S.D.N.Y. 1997) (upholding awards of $114,000 to two plaintiffs for willful and malicious conduct that also supported a $410,000 punitive damages award).

All of these cases involved particularly egregious acts ranging from sexual assault to brutal beatings that distinguish them from the instant case, in which the jury

unequivocally found that the defendants did not assault or commit a battery against Mr. Green. Instead, the discriminatory behavior at issue lasted minutes at most, and given Mr. Green's condition, cannot reasonably be called "severe." In the district court's estimation, to which deference is due, the evidence of Mr. Green's physical and emotional injuries stemming from the incident was tenuous at best. With regard to the former, Dr. Carrano testified that when she first treated the back sores, ten months after Mr. Green's hospitalization, the Green family told her that the sores were only six months old. *Green II*, 2007 U.S. Dist. LEXIS 65842, 2007 WL 2584752, at *11. Plaintiff's pictures of the sores were undated, and hospital records indicate no signs of bruising on Mr. Green's skin even though his skin was checked twice each day of his stay. *Id.* With regard to Mr. Green's emotional injuries, plaintiff introduced no medical evidence of the magnitude or duration of Mr. Green's psychological distress. *See State v. State Div. of Human Rights*, 284 A.D.2d 882, 883, 727 N.Y.S.2d 499 (3d Dep't 2001) (reducing award for mental anguish caused by sexual harassment from $50,000 to $20,000 where "[n]o objective medical evidence was offered" to corroborate plaintiff's testimony). Accordingly, we agree with the district court's suggestion that the jury award of $400,000 in compensatory damages was excessive.

However, insofar as the district court's ruling on defendants' Rule 59(e) motion was based on the premise that the City had no liability, or that only nominal damages would be appropriate, that ruling was an abuse

of discretion.[2] We therefore remand to the district court for further proceedings on damages consistent with this order. *See Meacham v. Knolls Atomic Power Lab.*, 381 F.3d 56, 78 (2d Cir. 2004) (collecting cases and affirming mental anguish damages award of $125,000), *vacated on other grounds by KAPL, Inc. v. Meacham*, 544 U.S. 957, 125 S. Ct. 1731, 161 L. Ed. 2d 596 (2005); *Rainone v. Potter*, 388 F. Supp. 2d 120, 122-24 (E.D.N.Y. 2005) (discussing spectrum of damages awards appropriate to compensate for mental anguish).

Accordingly, with great respect for the able district judge, the judgment of the district court is hereby VACATED and REMANDED for further proceedings on damages consistent with this order.

2. The district court's suggestion that only nominal damages would be appropriate is untenable because, with respect the the HRL claim, the Court of Appeals has held that compensable emotional injury may be proved by plaintiff's own testimony. *New York City Transit Auth. v. State Div. of Human Rights*, 78 N.Y.2d 207, 216, 577 N.E.2d 40, 573 N.Y.S.2d 49 (N.Y. 1991).

Appendix A

DISSENT BY: PRESKA

DISSENT

PRESKA, District Judge, dissenting:

While I agree that the district court erred in granting judgment as a matter of law, I would affirm its grant of a new trial under Rule 59(a) because, unlike the majority, I do not believe that *Green I* should be read effectively to preclude the district court's evaluation of the evidence based on its personal observation of the relevant testimony. *See Green II* 2007 U.S. Dist. LEXIS 65842, [WL] at * 12-13. I therefore respectfully dissent as to the majority's ruling regarding the City's motion for a new trial under Rule 59(a).

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DECIDED AND FILED SEPTEMBER 6, 2007

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

01 Civ. 1996 (RMB)

SUSAN GREEN,
Executrix of the Estate of
WALTER GREEN, deceased,

Plaintiff,

-against-

CITY OF NEW YORK and PAUL GIBLIN,

Defendants.

September 6, 2007, Decided
September 6, 2007, Filed

JUDGES: RICHARD M. BERMAN , U.S.D.J.

OPINION BY: RICHARD M. BERMAN

Appendix B

OPINION

DECISION AND ORDER

I. *Background*

This litigation involves the difficult and tense events of March 19, 2000, which transpired after the 14-year-old daughter and the (medically untrained) home aide of Walter Green summoned "911" emergency responders employed by the City of New York to Mr. Green's Upper West Side Manhattan penthouse apartment for help. (*See* Alixandra Green Trial Testimony, July 10, 2007 ("A. Green Tr."), at 282:14-15, 236:3-5.) Mr. Green, who at the time suffered from advanced Amyotrophic Lateral Sclerosis (also known as ALS or Lou Gehrig's disease), was substantially paralyzed, was confined to a wheelchair to which a mechanical respirator (ventilator) was attached, and was unable to use his voice to speak (*see* William Hill Trial Testimony, July 9, 2007 ("Hill Tr."), at 29:2-3, 51:5-10), had fallen unconscious and was unable to breathe because both of his mechanical respirators had failed. (*See* A. Green Tr. at 233:3-6.) This life-threatening situation was further complicated by the fact that Mr. Green (it was later determined in the hospital emergency room) was also suffering from pneumonia and his air passages were filling with large amounts of yellow-green mucous. (*See* Susan Green Trial Testimony, July 12, 2007 ("S. Green Tr."), at 716:19-25; Dr. Tiffany Reiser Deposition Testimony, read at trial July 12-13, 2007 ("Reiser Tr."), at 872:16.) Mr. Green's (understandably)

frightened daughter told the 911 operator that her father was "dying" and "we need help!" (Pl. Ex. 27 at 3-4; *see* A. Green Tr. at 293:17-24, 294:19-24.)

Within minutes, New York City police officers, firemen (along with a hook and ladder truck), two fire department emergency medical technicians ("EMTs"), and two paramedics from St. Luke's Roosevelt Hospital, arrived at the Green home. (*See* Pl. Ex. 11 at 1.) Once there, however, they were presented with an extraordinarily difficult and unusual problem — in an atmosphere which a lawyer friend of the Green family who had also been summoned to the scene would describe at trial as "chaos" and "pandemonium." (Joan Bertin Trial Testimony, July 9-10, 2007 ("Bertin Tr."), at 132:17-20.) That is, Mr. Green's wife, Susan, had arrived home a few minutes before the City responders got there and she and her daughter were able to provide air to Mr. Green by using a hand-operated plastic bellows-type device called an "ambu-bag" (which they attached to his tracheostomy) and by suctioning "a huge plug" of mucous from Mr. Green's lungs. (A. Green Tr. at 238:7-11, 22-23.) And, after inviting the 911 responders into the apartment to help care for Mr. Green, Susan Green told the responders, "I really appreciate it but we don't need you anymore," that the Green family could handle the situation at home, that Mr. Green (who communicated by eye blinks and by computer) did not want to go to the hospital, and that a respirator repairman, who was summoned from Suffolk County but

had not yet arrived, was on the way.[1] (S. Green Tr. at 710:5-8, 711:23-25, 723:19-20; *see* Hill Tr. at 53:12-13, 55:20-56:10.) The Green family did not produce to the City responders any document reflecting Mr. Green's medical wishes or the authority of a family member to make medical decisions on his behalf. (*See* Walter Green Deposition Testimony, read at trial July 11-12, 2007 ("W. Green Tr."), at 759:5-16; S. Green Tr. at 695:2-4.)[2]

While in the Green apartment (during the first 30 minutes), one of the paramedics called "Telemetry," a City-run telephone service staffed by medical professionals who assist 911 responders in the field dealing with unusual situations. (*See* Pl. Ex. 27 at 21.) The paramedic advised Telemetry of the circumstances at the Green apartment, including Mr. Green's medical history of ALS, his inability to use his voice to speak, the failed respirators, and the facts that he had been unconscious, was being "bagged" or breathed for manually via ambu-bag, was "septic, and had "100 cc's of yellow-green mucous" suctioned "out of his lungs." (Pl. Ex. 27 at 21-22.) Telemetry did not offer an opinion about how to deal with Mr. Green but rather determined

1. Mrs. Green's lack of a sense of urgency was explained at trial as follows: "No, I did not think this was really an emergency . . . Walter had died once before . . . and he came back." (S. Green Tr. at 736:2-4 (emphasis added).)

2. Plaintiff argued at trial that Mr. Green communicated by blinking in response to yes or no questions (one blink for "no," two blinks for "yes") and by typing with one finger on his computer, "I fine no hosp." (A. Green Tr. at 239:3-5, 244:5-6.)

that a supervisor immediately should be sent to the Green apartment to observe the situation and to suggest an appropriate outcome, i.e., acceptance of a refusal of medical attention or transport to a hospital. (*See* Dr. Flavio Crisari Trial Testimony, July 10, 2007 ("Crisari Tr."), at 320:4-7; *see* Pl. Ex. 27 at 24 ("standby for the lieutenant and see what he can . . . get done from there").) Thereupon, Defendant Lieutenant Paul Giblin was directed to the Green apartment. (*See* Pl. Ex. 11 at 1-2.)

Upon arriving at the Green apartment at approximately 3:33 p.m., Lieutenant Giblin conferred with the paramedics on scene. (*See* Paul Giblin Trial Testimony, July 10-11, 2007 ("Giblin Tr."), at 364:2-4, 368:8-11.) He learned from the paramedics that Mr. Green had been unconscious shortly before the first responders arrived (*see* Pl. Ex. 12, 13), that there was no working mechanical respirator in the apartment (*see* S. Green Tr. at 704k17-18), and that Mr. Green was suffering from a respiratory infection of some sort and had a large amount of yellow-green mucous in his lungs. (*See* S. Green Tr. at 716:19-25.) Lieutenant Giblin was told that a respirator repairman had been called but had not arrived. (*See* A. Green Tr. at 253:22-254:6.) When Lieutenant Giblin determined (with the unanimous support of the paramedics on scene) that the medically prudent course of action was to transport Mr. Green to St. Luke's for evaluation and treatment — and not, as Mrs. Green had requested, to leave Mr. Green behind in these circumstances (*see* C.K. Collins Trial Testimony, July 11, 2007 ("Collins Tr."), at 825:2-4), the Green family

became uncooperative and, thereafter, physically confrontational. (*See* S. Green Tr. at 723:16-19.) Mrs. Green kicked and injured one of the EMS workers (who later successfully sued Mrs. Green in state court for damages) (*see* S. Green Tr. at 725:2-6, 726:9-14); Mr. Green's daughter, Alixandra, at her mother's direction, "barricaded [the] front door with all the furniture that [she] could find" so the City responders could not leave with her father (A. Green Tr. at 254:12-15); and Joan Bertin, the family friend who is also a lawyer, had a "screaming" and "cursing" verbal confrontation with police officers on the scene (Bertin Tr. at 158:14-15 (telling them at one point "this is fucking outrageous")) and when she lost the argument, Ms. Bertin called a relative who was a director at NBC news and requested that NBC immediately send a news team to the Green home. (*See* Bertin Tr. at 155:9-14, 158:2-15, 208:12-25.)

After remaining at the Green apartment for approximately ninety minutes (and still no respirator repairman having arrived), the City responders removed Mr. Green over Mrs. Green's objection (*see* Pl. Ex. 11 at 2) and transported him to the emergency room at St. Luke's Roosevelt Hospital ("St. Luke's"), the closest 911 receiving hospital. (*See* Captain Brian Milzoff Trial Testimony, July 10, 2007 ("Milzoff Tr."), at 358:6-9.) Mr. Green was evaluated at St. Luke's emergency room and received pure oxygen for several hours. (*See* Reiser Tr. at 865:14-16, 891:5-13; Def. Ex. C.) And, despite Mrs. Green's earlier protests against any hospitalization and further treatment, Mr. Green was, immediately thereafter, admitted to St. Luke's with his consent.

(*See* Reiser Tr. at 866:6-13 ("I explained to him that I thought he needed to be admitted to the hospital . . . [a]nd using yes and no questions I asked him whether he thought it was reasonable that I admit him into the hospital, and he agreed").) In fact, Mr. Green was, with his consent, treated successfully for, among other things, pneumonia (with antibiotics) for a total of seven days, first in the Medical Intensive Care Unit at St. Luke's and then at Columbia Presbyterian Hospital. (*See* Def. Ex. C, D at A394.)

Dr. Anthony Mustalish, a medical doctor with expertise in emergency medicine who was called by the defense at trial as an expert witness — and whose expert opinion was never challenged by an expert for Plaintiff — opined "with a reasonable degree of medical certainty" that Walter Green "needed to be transported to a hospital emergency department for further evaluation and treatment" on March 19, 2000 and, if the responders had left Mr. Green behind in his apartment, "more likely than not he would have died." (Dr. Anthony Mustalish Trial Testimony, July 12, 2007 ("Mustalish Tr."), at 667:9-17.)

Prior Proceedings

Walter Green ("Plaintiff") along with Susan and Alixandra Green filed a complaint with the Court against the City of New York ("City") and Lieutenant Giblin (collectively, "Defendants") on or about March 8, 2001, arguing, among other things, that Defendants "discriminated against plaintiff Walter Green by failing

to heed his expressly stated and competently given wishes regarding his own care and treatment solely because he suffers from a disability which renders him incapable of unassisted verbal speech, violated the civil rights of plaintiff Walter Green, unlawfully assaulted plaintiff[] and forcibly removed Walter Green from his home against his clearly stated desires causing plaintiff[] to suffer serious injuries," including body "sores" and "emotional injuries." (*See* Amended Complaint dated July 10, 2001, at 1-2, 14, 19.) On February 3, 2004, prior to trial, the Court dismissed all claims against Lieutenant Giblin and the City of New York, by adopting the report and recommendation ("Report") of Magistrate Judge Gabriel W. Gorenstein, dated January 5, 2004, which recommended that the Court grant the Defendants' motion for summary judgment. Judge Gorenstein had found, among other things, that none of the City officials or employees had "acted unreasonably . . . in bringing Mr. Green to a hospital where his condition could be properly treated and stabilized," that Lieutenant Giblin was entitled to qualified immunity, and that, in any event, "the decision to treat Mr. Green was not based on his inability to talk but rather was based on Giblin's perception that Walter Green 'was in extremis,' and he needed to go to the hospital because he could not breathe for himself." (Report at 16, 22.) The Court accepted Judge Gorenstein's findings and recommendations. (*See* Order dated Feb. 3, 2004 ("the evidence presented by Plaintiffs is insufficient, as a matter of law, to permit the action to continue and to support Plaintiffs' claim that Walter Green was discriminated against").) On appeal, the United States

Appendix B

Court of Appeals for the Second Circuit upheld the Court's decision in part and vacated and remanded with respect to Walter Green's claims under the Americans with Disabilities Act ("ADA"), the New York State Human Rights Law ("HRL"), the Fourth Amendment to the U.S. Constitution, and New York State assault and battery laws. *See Green v. City of New York*, 465 F.3d 65, 78, 84 (2d Cir. 2006) ("the evidence in this case could support a jury finding that [Lieutenant] Giblin perceived Walter [Green] as incompetent because of Walter's extreme physical disability and therefore denied him the right to use the City's evaluation system" for refusals of medical assistance, and "we conclude there are factual issues relevant to qualified immunity").[3]

The Court conducted a five-day jury trial, from July 9 through 13, 2007, of Mr. Green's claims of discrimination under the ADA and HRL, unlawful seizure and excessive force under the Fourth Amendment to the U.S. Constitution, and assault and battery under New York State law. At the close of Plaintiff's case, and again at the close of all evidence, Defendants moved for a judgment as a matter of law pursuant to Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 50(a) ("Rule 50(a)"), arguing that "there is no

3. The Court of Appeals upheld the dismissal of all claims brought by Susan Green. *See Green*, 465 F.3d at 86. Defendants subsequently filed a motion to dismiss the assault and battery claims brought by Alixandra Green under New York State law. (*See* Defendants' Motions *in limine* dated May 29, 2007.) The Court granted Defendants' motion on July 6, 2007. (*See* Order dated July 6, 2007.)

legally sufficient evidentiary basis for the jury . . . to find for the plaintiff in this case." (Trial Tr. at 621:21-24.) Following both applications, the Court reserved decision. (*See* Fed. R. Civ. P. 50(b); Trial Tr. at 624:21-25, 908:6-8.) With de minimus exceptions, both sides agreed to the Court's jury charges. (*See* Trial Tr. at 881:1-25)[4] The parties also agreed to the verdict sheet which contained the following special interrogatory: "**Was retired Lieutenant Paul Giblin's decision to remove Walter Green from his home on March 19, 2000 reasonable?**" (Court Ex. E at Question 3.)[5]

The jury responded "**Yes**" to this interrogatory about the reasonableness of Lieutenant Giblin's decision to remove Mr. Green from his home on March 19, 2000. (*See* Court Ex. J at Question 3.)[6] The jury also determined that, in removing Mr. Green from his apartment, Lieutenant Giblin did not use excessive force under the Fourth Amendment to the U.S. Constitution, (*see* Court Ex. J at Question 1(b)), and that Lieutenant Giblin did not effect an unlawful seizure of Mr. Green under the Fourth Amendment to the U.S. Constitution.

4. (*See also* Transcript of Oral Argument, Sept. 4, 2007 ("Oral Argument Tr.").)

5. (*See* Trial Tr. at 882: 1-2 ("Defendants are in agreement with . . . the verdict sheet"), 882:21-22 ("[t]e verdict sheet is acceptable to [P]laintiffs").)

6. Among the implications of the jury's "yes" response, is that Lieutenant Giblin is entitled to qualified immunity. *See Green*, 465 F.3d at 83; *Papineau v. Parmley*, 465 F.3d 46, 63 (2d Cir. 2006).

(*See* Court Ex. J at Question 1(a).) And, the jury determined that the City did not commit an assault or battery under New York State law by removing Mr. Green. (*See* Court Ex. J at Question 6, 7.)

At the same time, the jury determined that the City violated Mr. Green's rights under the ADA, and that the City and Lieutenant Giblin violated Mr. Green's rights under the HRL (*see* Court Ex. J at Question 2, 4, 5), and the jury awarded Mrs. Green, as executrix of Walter Green's estate, $400,000 in compensatory damages. (*See* Court Ex. J at Question 9.)

Post-Trial Motions

On or about July 27, 2007, the City filed a (renewed) motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b) ("Rule 50(b)"), arguing that "there is no legally sufficient evidentiary basis to find for [P]laintiff" on the ADA or HRL claims. (Def. Mem. at 2.) The City argues that Plaintiff failed to prove his ADA claim because he did not establish that "his disability . . . was the determining factor in the decision to transport him to a hospital," or that "he suffered damages as a result" (Def. Mem. at 7, 8); and Plaintiff failed to establish that "the HRL applies to the facts in this case," that "he was denied services because of his disability," or that "he suffered damages as a result." (Def. Mem. at 10, 14.) In the alternative, the City argues that the Court should "order a new trial pursuant to [Fed. R. Civ. P.] 59" ("Rule 59") on the ADA and HRL claims "or significantly reduce the damages award pursuant to Rule 59" because "[t]he

exceedingly high award makes the jury's decision suspect . . . ." (Def. Mem. at 1-2, 17.)

On or about August 24, 2007, Plaintiff opposed the City's Rule 50(b) and 59 motions, arguing that "[D]efendants' conduct in failing to afford Walter [Green] the right to control his body and fate enjoyed by non-disabled persons constituted discrimination." (Pl. Mem. at 2.) Plaintiff argues that "this court is constrained by the holding of the Court of Appeals for the Second Circuit which has effectively already affirmed the jury's finding that defendants violated the [ADA] and [HRL]" and "this court cannot properly grant judgment as a matter of law on the basis of trial evidence that is not substantially different than that presented on summary judgment." (Pl. Mem. at 1-2)[7] Plaintiff also argues that "there is not a scintilla of evidence in support of [the City's] argument" that Plaintiff's "physical injuries (the sores) were not caused by defendants' conduct" and "[t]he jury's compensatory damages award of $400,000 for Walter's physical and emotional injuries was reasonable and fair." (Pl. Mem. at 9-10.)

7. The Court respectfully disputes, among other things, Plaintiff's contention that the U.S. Court of Appeals for the Second Circuit has "already affirmed the jury's finding that defendants violated the [ADA] and [HRL]." The Court believes this Decision and Order is thoroughly consistent with Second Circuit precedent, including, e.g., *Olivier v. Robert L. Yeager Mental Health Ctr.*, 398 F3d 183, 190 (2d Cir. 2005) and *Green*, 465 F3d at 78.

On or about August 30, 2007, the City filed a reply. (*See* Reply, dated Aug. 30, 2007, at 3-4 ("the evidence adduced at trial was significantly different from that produced in the summary judgment motion" and "[P]laintiff completely failed to refute [in opposition to the City's 50(b) motion] that there was no evidence adduced at trial illustrating Walter Green was treated differently than any similarly-situated non-disabled person").)

On September 4, 2007, the Court heard oral argument. (*See* Oral Argument Tr.)

The Court, for the reasons set forth below, concludes that, pursuant to Rule 50(b), judgment in favor of the City is appropriate with respect to the ADA and HRL claims. *See* Fed. R. Civ. P. 50(b). Indeed, if ever there were a case which warranted granting a Rule 50(b) motion and reversing a jury determination of liability (and damages), this is that case. The decision to remove Mr. Green for hospital evaluation and treatment was, as the jury concluded, "reasonable" and there was no legally or factually sufficient basis, viewing the evidence in the light most favorable to Plaintiff and deferring to credibility determinations and reasonable inferences of the jury, for a reasonable jury to conclude that the City's actions (including those of Lieutenant Giblin) violated the ADA or HRL. Specifically, the Court concludes, viewing the evidence in the light most favorable to Plaintiff, that (i) there was no discrimination by the City responders because their decision to remove Mr. Green was medically driven; (ii) the decision to remove Mr.

Green was reasonable (as the jury determined) and not discriminatory because the unrebutted expert testimony at trial showed that Mr. Green lacked the decisional capacity to determine the appropriate course of his treatment while at his home; and (iii) there was no discrimination by Telemetry officials whose decision was (simply) to send a supervisor to the Green home further to evaluate the circumstances.[8] And, (iv) Mr. Green's alleged injuries (sores) were not caused by Lieutenant Giblin's (reasonable) decision to remove Mr. Green for evaluation and treatment at St. Luke's.

While it is natural to have empathy for Mr. Green (who passed away from his terminal disease some 19 months after the incident on March 19, 2000) and his family, the unrebutted evidence and applicable law compels the Court to set aside that portion of the jury's verdict which determined that Mr. Green was discriminated against by Defendants.

For the reasons set forth below, Defendant's motion for a judgment as a matter of law pursuant to Rule 50(b) is granted.

---

8. As noted at pp. 4-5, *supra*, after Mr. Green had been placed on a mechanical respirator, treated with 100% oxygen for several hours and evaluated (*see* Reiser Tr. at 891:5-13) at St. Luke's, he consented to two days of hospitalization at St. Luke's and five additional days of hospitalization and treatment at Columbia Presbyterian Hospital (*see* Reiser Tr. at 866:6-13; Def. Ex. C, D) notwithstanding his family's earlier protests against hospitalization, evaluation and treatment.

Appendix B

II. Legal Standard

Rule 50(b)

Rule 50(b) "permits a party to 'renew' an earlier request for judgment as a matter of law [under Rule 50(a)] by filing a motion no later than 10 days after entry of judgment." *Broadnax v. City of New Haven*, 415 F.3d 265, 268 (2d Cir. 2005). A court may grant a judgment under Rule 50(b) if "the evidence, viewed in the light most favorable to the opposing party, is insufficient to permit a reasonable juror to find in her favor." *Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp.*, 136 F.3d 276, 289 (2d Cir. 1998). In granting such a judgment, "the court must give deference to all credibility determinations and reasonable inferences of the jury, and it may not itself weigh the credibility of witnesses or consider the weight of the evidence." *Id.*

"[A] plaintiff ordinarily must introduce expert testimony to establish the relevant medical standards that were allegedly violated." *Olivier*, 398 F.3d at 190. "Where [such expert testimony] is not proffered, the defendant is entitled to judgment as a matter of law . . . by means of a judgment notwithstanding a jury verdict in favor of the plaintiff." *Sitts v. United States*, 811 F.2d 736, 740 (2d Cir. 1987); *see also Olivier*, 398 F.3d at 191-92.

Appendix B

Rule 59(a)

"As a general matter, a motion for a new trial should be granted when, in the opinion of the district court, the jury has reached a seriously erroneous result or the verdict is a miscarriage of justice," for instance, "when the jury's verdict is against the weight of the evidence." *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F3d 124, 133 (2d Cir. 1998). Rule 59(a) "has a less stringent standard than Rule 50 in two significant respects: (1) a new trial under Rule 59(a) may be granted even if there is substantial evidence supporting the jury's verdict, and (2) a trial judge is free to weigh the evidence himself, and need not view it in the light most favorable to the verdict winner." *Manley v. AmBase Corp.*, 337 F3d 237, 244-45 (2d Cir. 2003) (citations omitted).

Rule 59(e)

"If a district court finds that a verdict is excessive, . . . under the practice of remittitur, [it] may condition a denial of a motion for a new trial on the plaintiff's accepting damages in a reduced amount." *Tingley Sys. v. Norse Sys.*, 49 F3d 93, 96 (2d Cir. 1995). "[T]he size of a jury's verdict may be so excessive as to be inherently indicative of passion or prejudice." *Ramirez v. New York City Off-Track Betting Corp.*, 112 F3d 38, 40 (2d Cir. 1997). Under federal law, remittitur is appropriate where a jury's award is "so high as to shock the judicial conscience." *Casey v. Long Island R.R.*, 406 F3d 142, 147 (2d Cir. 2005). Under New York State law, "jury verdicts may be set aside . . . where the jury's award

deviates materially from what would be reasonable compensation." *Meacham v. Knolls Atomic Power Lab.*, 381 F3d 56, 78 (2d Cir. 2004).

III. Analysis

The City argues that the Court should find "as a matter of law," under both the ADA and HRL, that Plaintiff failed to prove that he was denied a "service," i.e., access to the City's protocol for refusals to accept medical aid, "because of his disability" and that "there was no evidence put forth by the [P]laintiff that demonstrated that [P]laintiff had [decisional] capacity" to refuse medical aid. (Def. Mem. at 5, 7.) The City also argues that Plaintiff failed to prove "that he suffered damages as a result" of any denial of services by Defendants. (Def Mem. at 8.)

Plaintiff argues that Mr. Green's medical condition "is wholly irrelevant." (Pl. Mem. at 5.) Plaintiff contends that, "irrespective of his physical health, he had a right to refuse treatment if he was competent," that Mr. Green "was alert and oriented at the time he refused further treatment," and that the "injuries resulting from [Mr. Green's] removal were properly considered and decided by the jury." (Pl. Mem. at 5-6, 10.)

(i) Medical Basis for Removal

The Court concludes that the evidence (which, among other things, supports the jury's finding that Mr. Green "reasonably" was removed from his home),

viewed in the light most favorable to Plaintiff and with "deference to all credibility determinations and reasonable inferences of the jury," *Galdieri-Ambrosini*, 136 F3d at 289, was "insufficient to permit a reasonable jury to find in [his] favor." *Broadnax*, 415 F3d at 268. Mr. Green was not taken to St. Luke's emergency room because he had ALS or because he could not speak. Rather, he was taken to the hospital for evaluation and treatment for sound medical reasons, as follows: Lieutenant Giblin, after conferring with the paramedics on-scene, learned that Mr. Green "had been unconscious when they arrived," that the paramedics had performed "advanced life support" for Mr. Green (Giblin Tr. at 430:22-25), that Mr. Green "had developed a condition of hypoxia or lack of oxygen because he had stopped breathing for a period of time" (Giblin Tr. at 382:10-13), and that Mr. Green was "septic." (Pl. Ex. 27 at 21.) Lieutenant Giblin "assess[ed] the situation with the paramedics," recognized that Mr. Green's "ventilators were not working," "he had to be bagged" via ambu-bag in order to breathe, and "there was nobody [in the Greens' apartment] who was a competent medical authority" if the City responders were to leave (and "abandon") Mr. Green behind. (Giblin Tr. at 434:2-6.) Lieutenant Giblin understood that Mr. Green had some level of consciousness "but he was not able to make a decision for himself" and "therefore speaking to him would not have done me any good." (Giblin Tr. at 377:9-10, 435:24-25.) Lieutenant Giblin's "reasonable" decision was that Mr. Green needed to be transported to St. Luke's for evaluation and treatment and could

not be assessed for refusal of medical assistance."[9] (*See* Court Ex. J; S. Green Tr. at 716:5-18; Giblin Tr. at 383:12-13.)

In legal terms, there was no discrimination because Plaintiff did not show that Mr. Green was treated differently than "similarly situated persons without disabilities." *Henrietta D. v. Bloomberg*, 331 F.3d 261, 280 (2d Cir. 2003); (*see also* Court Ex. C. at 17.)[10]

9. Lieutenant Giblin based his decision, in part, upon the medical assessments of Mr. Green by the St. Luke's paramedics at the Green apartment. (Giblin Tr. at 430:6-10; Collins Tr. at 824:14-21.)

10. Title II of the ADA states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. ADA plaintiffs must demonstrate that "(1) they are 'qualified individuals' with a disability"; "(2) that the defendants are subject to the ADA"; "(3) that plaintiffs were denied the opportunity to participate in or benefit from defendants' services, programs, or activities, or were otherwise discriminated against by defendants, by reason of plaintiffs' disabilities"; and (4) "the defendant[s'] wrong is also the legal cause of the injury." *Henrietta D.*, 331 F.3d at 272, 278; (*see also* Court Ex. C. at 16.)

Section 296(2)(a) of the HRL forbids an "owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the . . . disability . . . of any person, directly or indirectly, to

(Cont'd)

Appendix B

Defendants adhered to the Fire Department of the City of New York Guidelines for refusal of medical aid ("Guidelines"), which are "designed to set out standards for . . . evaluations of refusals [of medical assistance]" (Crisari Tr. at 315:21-316:1), and which state that "pre-hospital care providers must thoroughly assess all patients, and provide appropriate care . . . prior to considering the acceptance of a Refusal of Medical Aid (RMA)." (Pl. Ex. 14 § 4.) This includes assessing whether "a mechanism of injury exists," and whether "[a]ny patient [is] in need of assistance due to physical or incapacitating limitations." (Pl. Ex. 14 § 4.1.) Plaintiff's witnesses confirmed that, among other things, Mr. Green's "mechanism of injury" was the failure of his mechanical respirators which were his normal source of oxygen (compounded by the yellow-green mucous in his lungs resulting, it was later determined, from pneumonia), that these conditions persisted throughout the hour and a half that the 911 responders were present in the Greens' apartment (*see* A. Green Tr. at 242:24-243:7), and that the lack of a working respirator was

(Cont'd)

refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof . . . ." N.Y. Exec. Law § 296(2)(a). HRL plaintiffs must show that they are denied a service "solely because they have [a] disability," *Cahill v. Rosa*, 89 N.Y.2d 14, 24, 674 N.E.2d 274, 278, 651 N.Y.S.2d 344 (1996), and that there exists a "legal connection between the alleged violations and the injuries sustained by plaintiff." *Warrick v. Capabilities, Inc.*, 299 A.D.2d 622, 623, 750 N.Y.S.2d 662, 664 (3d Dep't 2002).

"a very serious problem" for Mr. Green. (Hill Tr. at 60:25-61:6.) Because of his malfunctioning respirators, among his other conditions, Mr. Green was a "patient in need of assistance due to physical or incapacitating limitations" (Pl. Ex. 14 § 4.1.5), and he could not breathe without uninterrupted manual ventilation via ambu-bag and suctioning of mucous. (*See* Giblin Tr. at 380:5-6 ("he cannot be left behind without medical personnel there to take care of him").)

And because, among other factors, no respirator repairman had arrived (even after an hour and a half), the reasonable option available to the 911 responders to alleviate Mr. Green's "mechanism of injury" was to transport Mr. Green to the hospital for evaluation and treatment. (*See* Giblin Tr. at 381:21-22 ("he needed to go to the hospital to be put on a vent[ilator] because there was no working vent[ilator] at his house").) Lieutenant Giblin and the other responders complied with the Guidelines directive (to "provide appropriate care . . . prior to considering the acceptance of a Refusal of Medical Aid" (Pl. Ex. 14 § 4.1)), and adhered to "the standards of good and acceptable practice of emergency medicine." (Mustalish Tr. at 672:17-19.)[11]

Given Mr. Green's grave medical condition, the City's actions to help save Mr. Green's life were not discriminatory under the ADA or 1-ERL but, rather,

11. The two fire department EMTs helped care for Mr. Green while in his apartment (*see* Giblin Tr. at 430:6-13) by administering air to Mr. Green with the ambu-bag, to which the Green family did not object. (*See* S. Green Tr. at 710:5-711:13.)

were medically required. Dr. Mustalish opined that Mr. Green "had a number of conditions which if any one existed would be the basis for transfer [to a hospital]," including the fact that "he could not breathe without a ventilator and both [of Mr. Green's ventilators] were broken and nonworking"; "there are no trained medical personnel to provide the respiratory care on an interim basis"; "he had . . . green mucous, that blocked his airway to cause a respiratory arrest" and "[h]e would have died in a matter — in a very short time if that wasn't clarified."[12] (Mustalish Tr. at 667:17-25); *see Application of President & Dirs. of Georgetown Coll., Inc.*, 118 U.S. App. D.C. 80, 331 F.2d 1000, 1009 (D.C. Cir. 1964) ("[A] life hung in the balance. There was no time for research and reflection").

(ii) Lack of Decisional Capacity

Viewing the evidence in the light most favorable to Plaintiff and deferring to credibility determinations and reasonable inferences of the jury, *see Galdieri-Ambrosini*, 136 F.3d at 289; Defendants established at trial through expert testimony — which Plaintiff failed to counter with an expert of his own — that Mr. Green lacked the decisional capacity to refuse transport to

12. Dr. Mustalish also testified that Mr. Green "sustained an ischemic or anoxic event" in which "many organs were affected" and "[y]ou don't know whether or not the kidneys are going to shut down, whether he will go into heart failure or have some kidney failure from the oxygen — lack of oxygen. And the full extent of the injury . . . may take several hours to develop." (Mustalish Tr. at 668:5-18.)

St. Luke's for further medical evaluation and treatment while in his apartment on March 19, 2000. (*See* Crisari Tr. at 324:16-19; Mustalish Tr. at 687:10-12); *see also Henrietta D.*, 331 F.3d at 275.[13] Defendants' expert, Dr. Mustalish, opined that "any time from six minutes or more" of oxygen deprivation "would be sufficient to give injury to the brain" (Mustalish Tr. at 681:8-9) and that due to the "period of time of anoxia" that Mr. Green suffered (at least six minutes (*see* Reiser Tr. at 869:3-8)) "his ability to be competent to make th[e] decision" to refuse medical assistance, assuming *arguendo* that he had stated such a desire, "could not be validated or counted on . . . because the injury to his brain alone would alter his judgment." (Mustalish Tr. at 670:22-671:10.) Dr. Mustalish testified — again unrebutted by any expert for the Plaintiff — that Mr. Green and, his family "could not [have been] aware of the gravity of his medical situation" while in the apartment on March 19, 2000 because "the extent of his pneumonia, the infiltrate, and the extent of his white cell infection and the failure of his antibiotics was not known by anybody until the emergency radiology test was done, x-rays were done and until the blood test was done [at St. Luke's]." (Mustalish Tr. at 692:3-12.)

Defendants also presented unrebutted testimony from Dr. Reiser, the physician who evaluated Mr. Green at St. Luke's, that the EMTs had reported that Mr. Green had been hypoxic for six minutes, that he was

13. The Guidelines state that "a patient must demonstrate the decisional capacity to make an informed refusal before he/she can refuse medical aid." (Pl. Ex. 14 § 4.2.)

treated for hypoxia with 100% oxygen for several hours while in the emergency room at St. Luke's, and that Dr. Reiser believed Mr. Green's "blood gas readings" demonstrated hypoxia. (*See* Reiser Tr. at 869:3-8, 890:23-891:13.) And when, after Mr. Green had received mechanical ventilation and 100% oxygen for several hours, Dr. Reiser made Mr. Green aware of his precarious medical condition, Mr. Green consented to remain at St. Luke's for further treatment — and then consented again to admission at Columbia Presbyterian Hospital for additional treatment — despite all of his family's earlier protestations against hospital evaluation and treatment aimed at the City and Lieutenant Giblin on March 19, 2000. (*See* Reiser Tr. at 866:6-13.)

Similarly, Lieutenant Giblin testified at trial that, while in the Greens' apartment, he believed that Mr. Green had developed hypoxia. (*See* Giblin Tr. at 382:10-13, 383:4-6 ("Q: Why do you say that, he was probably hypoxic? A: Because once his ventilator [stopped], unless someone started to bag him, hypoxia would go to his brain").) The Guidelines state that a person "is lacking the capacity to make an informed decision," if he is, among other things, "impaired by hypoxia." (Pl. Ex. 14 § 3.5.5)[14] Lieutenant Giblin testified that he believed Mr. Green "did not have [decisional] capacity" throughout

14. "Impaired by sepsis" is also listed in the Guidelines as a condition which indicates a lack of decisional capacity. (*See* Pl. Ex. 14 § 3.5.7.) Mr. Green was also reported to have "sepsis," or blood poisoning (*see* Mustalish Tr. at 656:9-22) by the paramedic at the Greens' apartment who described Mr. Green as "septic" during the call to Telemetry. (Pl. Ex. 27 at 21.)

the period of time that Lieutenant Giblin was in the Greens' apartment. (Giblin Tr. at 377:6-13, 378:14-15.)

At trial, Plaintiff offered no expert witness or other medical testimony to show that Mr. Green had the decisional capacity to refuse medical assistance on March 19, 2000. Rather, Plaintiff relied upon the testimony of the Green family (and Joan Bertin), as to their impressions of Mr. Green's decisional capacity during the events of March 19, 2000. Plaintiff's witnesses are not medical professionals and their testimony regarding whether Mr. Green had decisional capacity to refuse treatment or whether it was medically prudent to attempt to keep and treat Mr. Green at home was not, and no reasonable jury could find that it was, based upon appropriate evaluation of "relevant medical standards." *Olivier*, 398 F.3d at 190.[15]

Plaintiff's case must fail and the judgment against the City and Lieutenant Giblin must be reversed — **if for no other reason** — because Plaintiff offered no expert to counter Defendants' expert witness, Dr. Mustalish, who opined that Mr. Green lacked decisional capacity because of hypoxia. "[A] jury composed of non-experts typically cannot discern generally accepted medical standards," such as when a person in Mr.

15. Moreover, as noted, the undisputed testimony is that, after receiving several hours of pure oxygen at St. Luke's, Mr. Green consented to hospitalization and treatment, having learned about his precarious condition from Dr. Reiser. (*See* Reiser Tr. at 866:6-13, *see also* n.7, *supra*.)

Green's circumstances, suffering from the effects of oxygen deprivation and a number of other life-threatening conditions, lacks the decisional capacity to refuse medical treatment. *Olivier*, 398 F.3d at 190. In *Olivier*, the Court of Appeals for the Second Circuit reversed the district court's denial of the defendants' motion for a post-trial judgment as a matter of law, stating that because the plaintiff "did not introduce expert testimony as to medical standards, there was no legally sufficient evidentiary basis for a reasonable jury to find for [the plaintiff]." 398 F.3d at 190-91.[16]

16. Plaintiff argued at trial that Mr. Green's decisional capacity was reflected in a call report prepared by the paramedics on-scene on March 19, 2000, which indicated that Mr. Green's Glasgow Coma Scale ("GCS") grade increased from a 3 out of a possible 15 at 2:57 p.m., when the EMTs and paramedics first arrived, to a 15 out of 15 at 3:20 p.m., shortly before Lieutenant Giblin arrived on the scene. (*See* Pl. Ex. 13.) Plaintiff also entered into evidence a call report prepared by the EMTs which showed that at 3:20 p.m., Mr. Green had a GCS grade of 12 out of 15. (*See* Pl. Ex. 12; Giblin Tr. at 409:24-410:4.) Dr. Mustalish explained that the GCS "does not reflect whether or not the patient can think or integrate complex data or make any kind of decisions. It is just a gross response to stimulation." (Mustalish Tr. at 649:23-25, 650:8-13.) Dr. Mustalish also testified that a grade of 3 on the GCS "means totally unresponsive to any kind of stimulation" and indicates "the deepest coma you can be in. In fact, a dead person has a 3." (Mustalish Tr. at 648:24-25, 649:8-9.)

Appendix B

(iii) Telemetry

No reasonable jury, viewing the evidence in the light most favorable to Plaintiff and crediting credibility determinations and reasonable inferences drawn by the jury, could have determined that Telemetry officials discriminated against Mr. Green (or caused Mr. Green to be discriminated against). Among other reasons, Telemetry determined only that a supervisor was needed on the scene (i.e., Lieutenant Giblin) to make the decision as to any refusal of medical assistance or removal, after gathering more information at the Greens' apartment. (*See* Crisari Tr. at 320:6-11.) A paramedic at the Greens' apartment contacted Telemetry at 3:14 p.m. on March 19, 2000 (Pl. Ex. 11), and informed Telemetry that Mr. Green had been "unconscious," had "a history of Lou Gehrig's disease," that his respirators had failed, that he was being ventilated via ambu-bag, that he had "about 100ccs of yellow green mucous" removed from his lungs, and that he was "septic." (Pl. Ex. 27 at 21, 23.) The Telemetry officials also learned that Mr. Green's "family does not wish to allow him to be removed from the residence." (Pl. Ex. 27 at 21.) Telemetry treated the situation as "a potential refusal of medical aid" in which the paramedics "needed more help on the scene for extenuating circumstances." (Crisari Tr. at 330:21-23.)

Based upon the information provided, the medical officials at Telemetry made the (non-discriminatory) decision at 3:18 p.m. on March 19, 2000 to send a supervisor, Lieutenant Giblin, to the scene to "assess

the scene again, assess the patient, and make a decision [whether] a refusal of medical aid [is] appropriate or is transport [to the hospital] necessary."[17] (Crisari Tr. at 320:6-11.) Dr. Flavio Crisari, the physician on staff at Telemetry on March 19, 2000, testified at trial that he directed that a "higher medical authority" report to the scene because "there were Other circumstances that made [the Telemetry paramedic] feel comfortable to have a backup as I did, due to the condition of the patient at that time." (Crisari Tr. at 331:25-332:2.)

(iv) Causation

Viewing the evidence in the light most favorable to Plaintiff and crediting credibility determinations and reasonable inferences drawn by the jury, Plaintiff failed to prove that any of the events which transpired on March 19, 2000, particularly Mr. Green's removal to St. Luke's about which the Greens complain, caused injury.[18] Plaintiff introduced to undated (close-up) photographs of sores previously taken in September and October of

17. (*See* n.16, *supra*, which indicates that at 3:18 p.m., no change in Mr. Green's GCS scale had yet been reflected in the call reports; *see also* Pl. Ex. 12, 13.)

18. Plaintiff's position was that his injuries arose, if at all, from the actions of Defendants in removing Mr. Green from his apartment. (*See* W. Green Tr. at 486:1-6 ("Q: Could you describe how you were injured on March 19, 2000? A: Being transferred, bumped downstairs, tilted uncomfortably in elevator, transferred again and lying for ten on hard flat emergency room bed").)

2000 (which Alixandra Green testified she recognized as having been on "my father's back"). (A. Green Tr. at 273:16-17; *see* Pl. Ex. 8B, 18C; S. Green Tr. at 729:13-23, 730:24.) Dr. Innocencia Carrano, a physical medicine specialist who treated Mr. Green's sores and who was called as Plaintiff's own witness, testified that when she first treated Mr. Green on January 26, 2001, more than ten months after the incident in question, the Green family "said that [the sores] were six months old" (Dr. Innocencia Carrano Trial Testimony, July 9, 2007 ("Carrano Tr."), at 97:4-5, 114:15-22) — which meant they had occurred in late July of 2000 or more than four months after the events of March 19, 2000. Mr. Green's records from his (consensual) admission at St. Luke's Roosevelt and Columbia Presbyterian Hospital for the six days after March 19, 2000, which reflect twice-daily evaluations of Mr. Green's skin, indicate that his skin showed no signs of injury. (*See* Def. Ex. C, D.) Based upon those same records, among other things, the expert opinion of Dr. John Hunter, a plastic surgeon called by the defense, was that "there is absolutely no evidence" that Mr. Green suffered shearing injuries "anywhere on his body" on March 19, 2000 and "there is not any possible causal relationship" between the events of March 19, 2000 and any sores Mr. Green may have developed. (Dr. John Hunter Trial Testimony, July 11, 2007, at 586:13-587:3, 587:15-588:3.)

As evidence of Mr. Green's alleged emotional injuries, Plaintiff presented testimony from Alixandra Green, Joan Bertin, and Mr. Green's respiratory therapist, William Hill, that, after the (life-threatening)

events of March 19, 2000, Mr. Green was "depressed," "less enthusiastic about living every day," "more subdued and withdrawn for a period of time," and "still angry about what happened." (A. Green Tr. at 264:12; Bertin Tr. at 178:2-3; Hill Tr. at 64:8-9.) Plaintiff also presented Mr. Green's narrative deposition response (which was prepared prior to his deposition and) presented to the jury by videotape. (*See* W. Green Tr. at 742:18 – 743:16; Pl. Ex. 30.) But Plaintiff presented no medical evidence or testimony that Mr. Green sought or received any medical or psychological assistance for his alleged emotional injuries. *See New York City Transit Auth. v. State Div. of Human Rights*, 78 N.Y.2d 207, 217, 577 N.E.2d 40, 41, 573 N.Y.S.2d 49 (1991) ("there must be some evidence of the magnitude of the injury"). And, Dr. Mustalish testified that "anoxia or lack of oxygen to the brain damages the brain and injures the brain," and "[p]atients who sustain brain injury will have change[s] in behavior, levels of depression." (Mustalish Tr. at 671:21-672:10); *see Meacham*, 381 F.3d at 78 ("[m]ental anguish damages must also be 'reasonably related to the discriminatory conduct' of the defendant").

The cause of injury to Mr. Green, if any, was Lieutenant Giblin's decision to take Mr. Green to St. Luke's for evaluation and treatment over his family's protests — which the jury found to be a reasonable decision (*see* n.5, *supra*). *See Warrick*, 299 A.D.2d at 623 (finding no liability under an ADA or HRL claim where there was "no legal connection between the alleged violations and the injuries sustained by

plaintiff'); *see also Sundance Cruises Corp. v. Am. Bureau of Shipping*, 799 F. Supp. 363, 391 (S.D.N.Y. 1992) ("where the employee's act that caused the alleged injury was found to be 'lawful' . . . the employer was therefore not liable under the doctrine of respondeat superior").

Motion for a New Trial

The Court is constrained to "also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the new trial." Fed. R. Civ. P. 50(c)(1). And, while the Court believes that Defendants clearly are entitled to judgment as a matter of law pursuant to Rule 50(b), in the event the Court's judgment as a matter of law is vacated or reversed, a new trial 'should be held to correct the (seriously erroneous result and) gross miscarriage of justice by the jury in finding the City liable for ADA and HRL violations. That aspect of the jury verdict was (overwhelmingly) against the weight of the credible evidence (and the law). *See DLC Mgmt. Corp*, 163 F3d at 133.

Having observed witness demeanor at trial, the Court finds that the City's witnesses were more objective, professional, and knowledgeable than the Plaintiff's witnesses — and, more credible. The Court, in particular, found the following evidence to be credible and persuasive:

Appendix B

- The testimony by Lieutenant Giblin that, based on what he learned upon arriving at the Greens' apartment, he concluded that Mr. Green was suffering from the effects of hypoxia and was not alert and oriented to person, place, and time, and, for these reasons, that he did not evaluate Mr. Green for a refusal of medical assistance (*see* Giblin Tr. at 383:1-6, 383:12-13, 435:24-436:1);

- Lieutenant Giblin's testimony that had he spoken with Mr. Green, it would not "have made any difference" regarding Lieutenant Giblin's decision to transport Mr. Green to a hospital for evaluation and treatment because Mr. Green was "in extremis" and "there was no medical authority for me to leave him there with" (Giblin Tr. at 377:1 1-13, 437:5 11);

- The testimony of Dr. Mustalish that Mr. Green lacked decisional capacity to refuse medical assistance while in his apartment due to "his period of time of anoxia, although resuscitated and he was alert, his ability to be competent to make that decision could not be validated or counted on" (Mustalish Tr. at 670:17-671:1);

- The (deposition) testimony of Dr. Tiffany Reiser that after Mr. Green had been placed on a respirator and given 100% oxygen for several hours at St. Luke's emergency room, had blood drawn and x-rays taken, and after she

informed Mr. Green of his problematic medical condition and test results, "he agreed" (consented) to be admitted to St. Luke's for two days, and thereafter to Columbia Presbyterian for five days (*see* Reiser Tr. at 866:6-13), which flatly contradicted the earlier, vigorous opposition of the Green family and Joan Bertin to Plaintiff's removal and hospitalization;

- Dr. Mustalish's testimony that, had Mr. Green not been taken to St. Luke's, it was "[m]ore likely than not he would have had another respiratory arrest which in the middle of the night or some other time would not have been so successful, that he would have died" (Mustalish Tr. at 673:6-9);

- Dr. Mustalish's testimony that "the decision to transport Mr. Green to the hospital met the standard of good and acceptable practice of emergency medicine" (Mustalish Tr. at 672:17-19);

- The notations in the call reports prepared by the EMTs and paramedics, reflecting that Mr. Green was in a deep coma with a GCS grade of 3 when they arrived and was not responsive to stimuli for more than half an hour (*see* Pl. Ex. 11, 12, 13); and

Appendix B

- The entry on the computer dispatch report that the Green family was "refusing to let [patient] who is being bagged to leave the house" at 3:09 p.m., approximately eleven minutes before Mr. Green regained consciousness. (Pl. Ex. 11 at 1; *see* Pl. Ex. 12.)

In contrast, the testimony of Plaintiff's witnesses reflected more bias and emotion than relevant medical facts, including, for example, Susan Green's statement, "[n]o, I did not think this was really an emergency" (S. Green Tr. at 736:3-4); and Joan Bertin's comment that "I thought . . . that my only recourse was publicity." (Bertin Tr. at 209:3-7.) Another example of Plaintiff's testimony which the Court did not find credible was the statement that, after arriving at St. Luke's, Mr. Green agreed to be admitted and remain hospitalized for seven days, not because of his hypoxia or his pneumonia but "because he was taken out of his wheelchair [and] we didn't have the means to get him home" and "we also would need to have called Access-A-Ride in advance to have them pick us up." (A. Green Tr. at 261:16-24.)

Remittitur

The City argues that, in the alternative to a judgment as a matter of law or a new trial as to liability, "a new trial should be granted" as to damages or "the Court should significantly reduce the jury award of $400,000 in compensatory damages because it is excessive, and is a miscarriage of justice." (Def. Mem. at 15-16.) Plaintiff responds that the jury's award is

appropriate because "[e]xtensive evidence was adduced by plaintiff that Walter suffered excruciating physical pain" and "exquisite emotional distress as a result of his treatment by the defendants." (Pl. Mem. at 11.)

While it may be tempting to suggest a remittitur because this case has been protracted and because the award of $400,000 in compensatory damages "shock[s] the judicial conscience" *Casey*, 406 F.3d at 147, and deviates "materially from what would be reasonable compensation," *Meacham*, 381 F.3d at 78, given the facts adduced at trial, the Court concludes that it would **not** be appropriate to permit a finding of liability against the City to stand for the reasons stated above and, therefore, the Court does not recommend either a new damages trial or remittitur. *See Ramirez v. New York City Off-Track Betting Corp.*, 112 F.3d 38, 40 (2d Cir. 1997) (if "the record establishes that the jury's verdict on damages was not only excessive but was also infected by fundamental error, remittitur is improper").[19]

19. Assuming, *arguendo*, the Court were to grant a remittitur, only nominal damages would be appropriate. *See Scala v. McCormack Lines, Inc.*, 985 F.2d 680, 684 (2d Cir. 1993).

IV. Conclusion

For the reasons stated herein, the Court grants the City's motion for judgment as a matter of law pursuant to Rule 50(b). If the judgment is vacated or reversed on appeal, the Court, alternatively, grants the City's motion for a new trial on Plaintiff's ADA and HRL claims pursuant to Fed. R. Civ. P. 50(c) and 59(a).[20]

The Clerk of Court is respectfully requested to enter judgment in favor of the City of New York and Lieutenant Paul Giblin and to close this case.

Dated: New York, New York

September 6, 2007

RICHARD M. BERMAN, U.S.D.J.

20. The jury's determinations in favor of Defendants as reflected in the verdict sheet are compelled by the evidence adduced at trial and are not challenged by Plaintiff.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED OCTOBER 5, 2006 AND AMENDED OCTOBER 24, 2006

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 04-1006-cv

SUSAN ROSS GREEN as Executrix of the Estate of WALTER GREEN, deceased, SUSAN ROSS GREEN, and ALIXANDRA GREEN, an infant, by her Mother and Natural Guardian, Susan Ross Green,*

Plaintiffs-Appellants,

-v-

CITY OF NEW YORK, PAUL GIBLIN, and ST. LUKE'S-ROOSEVELT HOSPITAL CENTER,

Defendants-Appellees.

December 15, 2004, Argued
October 5, 2006, Decided
Amended October 24, 2006.

* Because the court has directed the substitution of Susan Ross Green, as executrix of the estate of Walter Green, her deceased husband, we direct the Clerk to amend the caption accordingly.

Appendix C

JUDGES: Before: POOLER and KATZMANN, Circuit Judges.**

OPINION BY: POOLER

OPINION

POOLER, Circuit Judge:

This appeal stems from a decision by the individual defendant, New York City Fire Department Lieutenant Paul Giblin, to transport Walter Green ("Walter") to a hospital without evaluating whether Walter was competent to refuse treatment or whether he had done so. On March 19, 2000, Walter, whose amytrophic lateral sclerosis ("ALS") had progressed to the point that he could not breathe on his own, was at home with an assistant, Marcella Lopez, when his mechanical respirator stopped working properly. Because neither Lopez nor Walter's fourteen-year-old daughter, Alixandra, was initially able to locate the ambu-bag used to manually assist Walter with breathing, they blew air into Walter's trachea tube. Alixandra also called 911 for assistance, but while she was still on the phone, Susan Green ("Susan"), Alixandra's mother and Walter's wife, returned to the apartment and located the ambu-bag.

** Judge Raggi, a member of the panel who heard oral argument, subsequently recused herself. Therefore, this case is decided by the two remaining members of the panel pursuant to Section 0.14(b) of the Rules of the United States Court of Appeals for the Second Circuit.

The three women then succeeded in restoring Walter to consciousness and competence.

After Walter became conscious, several emergency personnel from the New York City Fire and Police Departments and St. Luke's-Roosevelt Hospital ("St. Luke's") came to the Greens' apartment. One of the last to arrive, Lieutenant Giblin, overrode objections from Susan, Alixandra, a family friend, and Walter himself, and ordered that Walter be transported to St. Luke's.

Against this difficult background, which, on this appeal from a grant of summary judgment, incorporates the evidence and adopts the inferences most favorable to plaintiffs, we must answer five primary questions: (1) whether Walter had a right under the Fourth Amendment to the United States Constitution to be free of the seizure that occurred when he was transported to St. Luke's; (2) if so, whether the contours of Walter's Fourth Amendment right were sufficiently established on March 19, 2000, that a reasonable municipal employee would have known that he had such a right; (3) whether Walter had a right under the Fourteenth Amendment to decline to be taken to St. Luke's; (4) if so, whether this right was sufficiently clear and established to defeat the individual defendants' claim of qualified immunity; and (5) whether there is sufficient evidence in the record to require a trial on Walter's claim that the defendants violated the New York Human Rights Law ("HRL"), N.Y. Executive Law § 290 et seq., and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq, by failing to assess his competence to decline treatment. The appeal also requires us to resolve issues of municipal and employer liability.

Appendix C

BACKGROUND

The Facts.

As we must in reviewing a grant of summary judgment, we view the facts in the light most favorable to plaintiffs and draw from those facts every favorable inference that a reasonable fact-finder could draw. *See Anthony v. City of New York*, 339 F.3d 129, 134 (2d Cir. 2003).

Walter was first diagnosed with ALS, a neuromuscular disease, in 1993. By 1997, he was using a mechanical respirator. Even after he began using the respirator, Walter continued athletic activities including wheelchair marathons. Walter was also a long-term advocate for the needs of those with disabilities.

When Walter began using the respirator, his family members were trained in the use of the various machines and devices that Walter's care required including an ambu-bag, a bag that fit into Walter's trachea tube and could be used for manual ventilation when the mechanical ventilator was not working. Between 1997 and the incident in March 2000, Walter's mechanical ventilator malfunctioned four times. On one occasion, the ventilator malfunctioned in the middle of an airline flight to Germany. By taking turns using the ambu-bag for three and a half hours, Susan, Alixandra, and a stewardess were able to provide sufficient oxygen to Walter, and he suffered no adverse health consequences. Family members also used the ambu-bag to help Walter

breathe when his digestive processes required so much energy that the mechanical ventilator provided insufficient oxygen.

On March 19, 2000, Walter had pneumonia. At some point, Susan and Alixandra left the apartment, leaving Lopez to care for Walter. After they left, Walter began feeling light-headed. Lopez noticed Walter's distress, called Susan, and told her that "Walter [was] feeling bad" and that Susan should return. Although it appeared that the ventilator was working, Lopez also asked Walter if he was getting enough air. When he replied, "no," Lopez began blowing into Walter's tube as she had been taught by Shirley Barboza, Walter's regular attendant.[1]

Alixandra arrived at the family apartment approximately ten minutes after Lopez's call. She found her father passed out with his eyes rolled back, his skin green, and his face cold. Lopez was "breathing for him [by] blowing into his trache[a] to give him air." Alixandra assisted Lopez by taking turns blowing into her father's trachea. The two also took turns suctioning mucus from Walter. Alixandra looked for the ambu-bag but was unable to find it. Within five minutes of Alixandra's arrival, Lopez told the teenager to call 911.

The transcript of the tape between Alixandra and 911 indicates that the conversation began at 2:40 p.m. with Alixandra telling the operator that her father was

1. Lopez did not use the ambu-bag as she had been instructed because it was not in its usual place.

having trouble breathing because his ventilator was not working. Alixandra also said "we need help," and the operator indicated an ambulance was on the way. Later in the conversation, Alixandra said that her father was dying, and the emergency operator said, "He's breathing so calm down she can stop screaming." Alixandra then dropped the telephone, so that she could try to fix the ventilator.[2]

About five minutes after Alixandra arrived at the apartment, her mother returned and found the ambu bag. With use of the ambu-bag and suctioning, Walter returned to consciousness and regained his usual color in less than five minutes. Asked if he was all right, Walter blinked twice, his signal for "yes." He then blinked five times, which was his code for "I love you. Don't worry." He also entered "I'm OK" with one finger on his laptop, which spoke the words for him. When Walter returned to consciousness, he noticed only his wife and daughter in the apartment. He was able to think clearly within five minutes of his revival.

After Walter regained consciousness, St. Luke's Emergency Medical Service personnel and police officers came to the apartment. One officer asked Walter if he wanted to go to the hospital. Walter blinked "no,"

2. At some point, it appears that Lopez either joined or replaced Alixandra on the phone. Thus it is unclear who actually made certain statements. It is irrelevant to our analysis which of the two made particular comments. Therefore, and for the sake of simplicity, we assume that all of the statements we have quoted were made by Alixandra.

and repeated on his computer "no, because I fine." The computer spoke the words out loud. Walter repeated his desire not to be hospitalized many times as did his wife. Susan also explained Walter's eye-blinking system in which one blink meant "no," and two blinks meant "yes," as well as his computerized method of communication. St. Luke's paramedic Chris Collins ignored Susan's explanation that Walter could communicate by blinking and "could answer for himself if Mr. Collins would only come and look." Susan also thanked the officers for coming but explained that the family had things under control now. In the face of Susan's claim that Walter was now all right, Collins said that he would be the judge of Walter's condition.

At around 3:12 p.m., Collins called the FDNY's Medical Control system ("telemetry"), which allows on-the-scene emergency personnel to talk to a paramedic who, in turn, has access to a physician. Telemetry physicians can help responders evaluate whether a refusal to accept medical assistance has been competently made. He said:

> Okay here's my situation. . . . It's a 60-year old male who has a history of Lou Gehrig's disease. . . . The patient's vent had died. . . . When we got there the patient's family was bagging him. The patient is septic . . . . We initiated [treatment] and the patient's family does not wish to allow him to be removed from the residence. . . .

Appendix C

The telemetry operator asked Collins if Walter could talk, and Collins responded, "he's got a trachea and he is being bagged he can communicate via computer." The telemetry operator then said: "Are they are — well that's not going to help us." Later the operator reported to Collins that the "doc" had said, "standby for the lieutenant and see what he can get you know get done from there."

An EMS report reflects that Walter "start[ed] to respond via eye contact and tr[ied] to communicate by laptop computer" at 3:20 p.m. A Fire Department report states that "around [3:20 p.m.] [patient] became alert communicating via computer and winks."

At 3:29, other officers including Giblin, came to the apartment. Giblin announced that he was in command and told Susan: "[w]e are taking him in." At that time, the words "no hosp" still appeared on Walter's computer screen. However, when Susan asked to call Bill Hill, Walter's respiratory therapist, Giblin told her to go ahead. Susan informed Hill that "[they] were ambu[]-bagging Walter, that there was some time when he was unconscious, that he was fine now, and that his oxygen level was 97." Based on this information, Hill considered Walter's oxygen saturation to be acceptable. Giblin then spoke to Hill who told him he was on his way.[3] When Giblin got off the phone, he said "He's in Lake Success. That is 45 minutes away. That is too long. We can't wait

3. Giblin, however, denied in his deposition that he had ever spoken to Hill, and stated that at the time, he had "no idea how close" Hill was to the apartment.

for him." Susan replied, "Maybe you should leave," and "we will just wait for him," but Giblin refused to leave. Susan begged Giblin to ask Walter questions, so that he could observe his answers, but Giblin refused to look at Walter.

Susan also called Joan Bertin, a family friend and attorney, who arrived at the Greens' apartment less than fifteen minutes later. By the time Bertin arrived, Alixandra had erected a makeshift barrier of furniture to keep the St. Luke's and City personnel from moving Walter from the apartment. Bertin looked at Walter, and asked if he was ok, and he blinked that he was. She observed that "he was conscious and alert and his skin color was okay." Bertin then asked Walter if he wanted to go to the hospital, and Walter blinked "no." Bertin confirmed with one of the EMS technicians that Walter had declined treatment and was alert and conscious. Bertin also told Giblin that Walter was alert, conscious and competent, and Giblin did not dispute this characterization. Giblin refused Bertin's request to speak to a supervisor as well as her request that he talk further to Hill.[4] Finally, Bertin asked Giblin, "If Walter could talk and say no, he didn't want to go, would you still take him?" Giblin replied that he would not.

Giblin was apparently sent to the Greens' apartment, pursuant to the New York City Fire Department ESMC

4 Giblin denied that he knew Walter could communicate by blinking or by computer. He also denied that Bertin told him that Walter was alert, conscious, and communicating.

OGP 106.04 (June 30, 1999)(the "Guidelines") because telemetry services could not evaluate Walter's decision-making capacity. The Guidelines, which contain procedures for evaluating refusals to accept medical assistance, provide that, in order to refuse medical treatment, a patient must be alert, oriented to time, place, and person, and have the ability to understand his medical condition, the possible risks or consequences resulting from refusal to accept medical aid, and treatment and transportation issues. *Id.* § 3.4. The patient must also have "[t]he ability to communicate, verbally or non verbally, the foregoing." *Id.* § 3.4.4. Where on-the-scene personnel believe the patient needs medical treatment but cannot secure his consent, they are instructed to contact telemetry. *Id.* §§ 5.1-5. If the telemetry operator is unable to reach a physician and is "unable to make an accurate determination of the patient's decisional capacity," it should "coordinate efforts with the crew using the prescribed Refusal of Medical Aid Questionnaire to expedite a correct patient transportation decision." *Id.* § 5.4.6(D) If an EMS command supervisor, such as Giblin, is at the scene, he or she must accept a competent person's refusal to accept medical treatment after making efforts to persuade the person to accept treatment. *Id.* § 5.5.7.

Giblin, however, saw his role quite differently. He testified that he was advised by his dispatcher "[t]hat the crew had a patient that needed to be removed and that the family was interfering with patient care." He also claimed that the St. Luke's paramedics told him that "they spoke to telemetry, that telemetry told them

that since the patient could not speak to them, they could not relay the information back and forth, and they should transport the patient." Neither paramedic recalled this conversation, and Giblin's account is inconsistent with the telemetry tape, which reflects only that a supervisor would be sent to the scene. Giblin believed that Walter was "in extremis and incredible condition because he was being bagged." He acknowledged, however, that, if Walter's ventilator had been working, he would not have been in extremis, because not being able to breathe on his own was his normal state. Giblin also acknowledged that he made no attempts to communicate with Walter, explaining that the crew told him Walter could not communicate. He added: "If he's not able to speak to the doctor, he is not communicating." He made the decision to transport Walter because Walter "was not able to breathe for himself." Giblin could not tell whether Walter was oriented to time, place, and person, and did not assess his decisional capacity.

Once Giblin decided that Walter must be transported, the officers began moving toward him. Susan also began to move toward Walter, and an officer's watch caught her lip, causing her to bleed. She also was "knocked down," but did not say who knocked her down or whether they were St. Luke's or City personnel. While Walter was being moved, his voice-activated laptop computer fell and broke. At some point, Alixandra came back into the room and saw Susan on the floor bleeding.

Giblin said: "We are going to the hospital whether you like it or not." Susan then asked if Walter could be taken to Columbia Presbyterian, which has an ALS unit.[5] Giblin responded, "No, we are going to St. Luke's Roosevelt." When Susan asked why, Giblin said "[b]ecause I said so."

City and St. Luke's personnel dismantled Alixandra's barricade, and dragged her out of the way. They then carried Walter out of the apartment. He had to be rolled in a stair chair down approximately seventeen steps and around three bends because there was no elevator between the Greens' eighteenth floor penthouse and the seventeenth floor. Alixandra realized that her father was uncomfortable, so she held his head with her hands. The officers and paramedics then transported Walter from the seventeenth floor to the lobby by elevator and from there to a waiting ambulance. Walter testified that the trip involved being "bumped downstairs, tilted uncomfortably in elevator, [and then] transferred again."

Walter arrived at St. Luke's, which is within ten minutes from the Green's apartment, at approximately 4:17 p.m. He was seen by Dr. Tiffany Reiser, who took a history from him by asking yes or no questions to which he responded by blinking. Dr. Reiser explained to Walter her reasons for believing he should stay in the hospital for awhile, and he consented. Susan also agreed, but

5. Giblin denied that anyone told him Walter had previously been treated at Columbia Presbyterian.

wanted to transfer Walter to Columbia Presbyterian. At this point, the family knew that Susan would be unable to care for Walter for a period of time because she had incurred leg injuries as a result of the incident. Further, Alixandra was leaving for England the next day, and Walter's regular nurse, Shirley Barboza, was on vacation.

Asked to sum up his experiences of that day, Walter later said:

> How to express in words the depth of pain I experienced that day. And it was by far the worst physical pain I've ever endured. . . . Nothing comes even close to the pain of that day. I cried in my wife's arms for an hour. . . . For 40 years, I have protected my family up until March of last year. Even with this disease, I have worked diligently to provide for all aspects of their lives. . . . I watched my wife get knocked to the floor and told to be handcuffed. I saw my daughter manhandled by large men who claimed to be helping. My home was violated, my self-respect crushed, . . . In the hospital, I couldn't look at my wife and children. I felt ashamed, and for the first time an utterly helpless man, worthless.

Susan also received medical attention at St Luke's for the injuries she incurred when she fell in the apartment.

Appendix C

District court proceedings.

On March 8, 2001, Walter, Susan, and Alixandra filed a complaint in the United States District Court for the Southern District of New York against New York City ["City"] and Giblin. On July 12, 2001, they filed an amended complaint adding St. Luke's as a defendant. In addition to alleging that defendants violated Walter's rights under the ADA and HRL by discriminating against him on the basis of disability, plaintiffs claimed that defendants violated certain of Walter's and Susan's constitutional rights and were thus liable pursuant to 42 U.S.C. § 1983. Further, they alleged that defendants committed various state law torts.

Although Walter died on December 9, 2001, the parties took his deposition prior to his death. At the completion of discovery, defendants moved for summary judgment. On referral, Magistrate Judge Gabriel W. Gorenstein recommended that the district court grant defendants' motion. *See Green v. City of New York*, 2004 U.S. Dist. LEXIS 5, No. 01 Civ. 1996, slip op. at 36, 2004 WL 213009 (S.D.N.Y Jan. 5, 2004).

Addressing Walter's ADA claim, the magistrate judge first narrowed this claim's applicability to the City because Title II of the ADA applies only to public entities. *Green*, 2004 U.S. Dist. LEXIS 5, slip op. at 14. He further held that there was insufficient evidence in the record to support plaintiffs' claim that the officers decided to transport Walter to St. Luke's because of his inability to speak. 2004 U.S. Dist. LEXIS 5, Slip op.

at 19. In so holding, the magistrate judge characterized, as Walter's "strongest piece of evidence," Bertin's testimony that Giblin admitted that if Walter could talk, he would not transport him to the hospital. 2004 U.S. Dist. LEXIS 5, slip op. at 16. He rejected Giblin's statement as too ambiguous to be probative, stating:

> The statement could be understood in at least two ways: (1) to refer simply to Mr. Green communicating his desire not to go; and (2) to refer to Mr. Green in a state where he was actually able to draw breath on his own in a manner sufficient to "talk" and utter the words, "I do not want to go to the hospital."

Id. Even assuming that the statement had some probative value, Judge Gorenstein held that a reasonable jury could not find discrimination in face of the "overwhelming" evidence that Giblin was motivated by his conclusion that Walter was "in extremis." 2004 U.S. Dist. LEXIS 5, slip op. at 16-19. He therefore recommended dismissing the ADA claim against all defendants.

Giblin moved for summary judgment on Walter's Section 1983 claims— which were read by the magistrate judge as alleging unlawful seizure and excessive force in violation of the Fourth Amendment and violation of Walter's Fourteenth Amendment right to refuse medical treatment-based on qualified immunity. The City contended that plaintiffs failed to

state a claim for municipal liability, and St. Luke's contended that it did not act under color of state law.

2004 U.S. Dist. LEXIS 5, Slip op. at 19.

The magistrate judge first considered plaintiffs' Fourth Amendment claim against Giblin. As required by *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), he began by determining whether there was sufficient proof of a constitutional violation to allow a reasonable jury to conclude that one had occurred. *Green*, 2004 U.S. Dist. LEXIS 5, slip op. at 22. Based on uncontested facts, he found that the seizure was not unreasonable. Among other things, the magistrate judge noted that (1) the emergency crews had been called to the scene by Walter's daughter who told the 911 operator that Walter was dying; (2) Walter was not able to breathe on his own for the entire time that the emergency crew was there, and both of his ventilators were not working; (3) Walter had been unconscious for some period of time before the emergency crews arrived; (4) no licensed medical personnel were in the home; (5) manual pumping continued for the whole time the crews were there, approximately one and a half hours; and (6) Hill did not arrive while the EMS personnel were in the apartment. *Id.* Acknowledging that plaintiffs presented evidence that Walter communicated to officers that he did not want to go to the hospital, the magistrate judge nevertheless determined that the decision to transport him was reasonable because it balanced Walter's right to refuse treatment against the state's right to preserve

life by "bringing [Walter] to a hospital where his condition could be properly treated and stabilized." 2004 U.S. Dist. LEXIS 5, at *4 . The magistrate judge also held that the defendants had a cognizable interest in protecting their employees from liability for abandoning Walter. 2004 U.S. Dist. LEXIS 5, Slip op. at 23. Because, in the magistrate judge's view, Walter's seizure was reasonable and he offered no evidence that the officers used any more force than was necessary to effect the seizure, the magistrate judge also recommended dismissal of the excessive force claim. 2004 U.S. Dist. LEXIS 5, Slip op. at 24.

Based on a similar balancing analysis, the magistrate judge found no Fourteenth Amendment violation, concluding that "the crisis atmosphere would reasonably have caused the officers to conclude that this was not a setting in which Walter Green could make an informed and competent decision regarding his treatment." 2004 U.S. Dist. LEXIS 5, at *37 .

The magistrate judge then turned to the City's liability under Section 1983. He found that plaintiffs failed to offer evidence that the City had a policy of failing to evaluate a non-speaking person's refusal to accept medical assistance. In fact, the magistrate judge found that the on-scene evaluation by supervisors was simply a "different —and likely more appropriate — method of evaluation." 2004 U.S. Dist. LEXIS 5, at *42. Magistrate Judge Gorenstein also rejected "failure to train" liability for the City. 2004 U.S. Dist. LEXIS 5 at *43 (*citing Walker v. City of New York*, 974 F.2d 293, 297-98 (2d Cir. 1992)).

Magistrate Judge Gorenstein next held that because plaintiffs named no individual St. Luke's employees as defendants, none of the actions of the St. Luke's employees at the scene were at issue. *Green*, 2004 U.S. Dist. LEXIS 5, slip op. at 28. He also held that plaintiffs had made out no claim based on the action of other individuals at St. Luke's because Walter consented to treatment and hospitalization once he arrived there. *Id.* Finally, the magistrate judge held that St. Lukes could not be liable for the acts of its employees under Section 1983. 2004 U.S. Dist. LEXIS 5, Slip op. at 29.

The magistrate judge then turned to Susan's Section 1983 claims for excessive force and false imprisonment. He recommended dismissal of her wrongful imprisonment claim because Susan offered no evidence that she was ever prevented from leaving her home. 2004 U.S. Dist. LEXIS 5, Slip op. at 29. Susan's excessive force claim was rejected because there was no evidence that the only individual defendant, Giblin, used excessive force against her. 2004 U.S. Dist. LEXIS 5, Slip op. at 30.

In addressing Walter's state law claims, the magistrate judge rejected the HRL claim for the same reason he had rejected the ADA claim-failure to offer proof of a discriminatory motive. 2004 U.S. Dist. LEXIS 5, Slip op. at 31. He recommended dismissal of the false imprisonment and arrest claims after holding that the officers were justified in their actions as a matter of law. 2004 U.S. Dist. LEXIS 5, Slip op. at 32. The magistrate

judge also rejected Walter's assault and battery claims, finding that there was no evidence that the officers used more force than was necessary to remove Walter from his home and that the emergency medical technicians were immune from liability absent a showing of gross negligence. 2004 U.S. Dist. LEXIS 5, Slip op. at 33. He recommended dismissal of the negligence claim, which was premised on failure to train, for the same reason that he had recommended dismissal of the parallel Section 1983 claim. 2004 U.S. Dist. LEXIS 5, Slip op. at 35.

The magistrate judge also rejected Susan and Alixandra's assault and battery claims— Susan's because she acknowledged she was injured "when her own actions caused her to come in contact with Officer Henriquez's watch and fall," and Alixandra's because the officers used only the force necessary to get her out of the way and she incurred only a small bruise. 2004 U.S. Dist. LEXIS 5, at *54.

Plaintiffs filed timely objections to the report-recommendation, which the district court rejected. *Green*, 2004 U.S. Dist. LEXIS 1414, 2004 WL 213009, at * 2 (S.D.N.Y. Feb. 2, 2004). Judge Berman's decision and order was filed on February 4, 2004, and plaintiffs filed a timely notice of appeal on February 16, 2004. On appeal, plaintiffs contend that dismissal of each of their claims, with the exception of those for false arrest and imprisonment, was erroneous.

Appendix C

DISCUSSION

I. The ADA Claim.

Walter alleged a violation of Title II of the ADA, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Because defendants admit that Walter was a qualified individual, we need resolve only whether St. Luke's or Giblin is a public entity and whether there is sufficient proof that defendants discriminated against Walter in the provision of services, programs, or activities.

Giblin

As plaintiffs tacitly concede, Giblin, the principal actor in this case, is not a proper defendant because he is an individual, not a public entity. *See* 42 U.S.C. § 12131(1). Therefore, we affirm dismissal of the ADA claim against Giblin, and turn to the claim against the City.

Appendix C

The City

The service to which Walter was allegedly denied access is the city's system for evaluating refusals to accept medical assistance.[6] The city's evaluation system is not discriminatory with respect to non-verbal individuals, at least on paper. It has three components, the latter two of which should safeguard the rights of non-verbal individuals. First, on-scene personnel who are not sure of a patient's competence to refuse treatment may contact the telemetry service where a doctor can talk with the patient and evaluate her competence and the voluntariness of any refusal. *See* Guidelines, § 5.3.2(c)(3). Second, in the absence of a physician, a telemetry operator who cannot properly evaluate the patient's refusal is instructed to complete a questionnaire with the help of on-scene personnel who deal directly with the patient. *Id.* § 5.4.6(D). In theory, this approach could be used with a non-verbal patient who, like Walter, can communicate in an alternative manner. It would have been especially apt in this case since on-scene personnel had already informed the telemetry operator that Walter could communicate by computer or eye blinks.[7] However, no attempt was made by the telemetry operator to use it. The final component,

6. Plaintiffs frame this issue "alternatively" as being "permitted to refuse services."

7. In fact, the emergency room doctor who eventually secured Walter's consent to treatment did so by asking questions that Walter could answer by blinking.

which apparently was attempted in this case, is the use of an on-site supervisor. *Id.* § 5.5. The on-site supervisor is required to accept a refusal from a competent person who needs treatment after all attempts to persuade the person have been exhausted. *Id.* § 5.5.7. Because the Guidelines indicate that a patient may indicate his refusal and his understanding of the consequences either verbally or non-verbally, *id.* § 3.4.4, action by Giblin in compliance with this policy would have resulted in an evaluation of Walter's non-verbal refusals.

Thus, the problem, if one existed, was not the system; it was the failure of on-site and telemetry personnel to use the methods dictated by the Guidelines. There is ample circumstantial evidence in the record from which a jury could infer that the basis for denying Walter access to the system in place for evaluating a refusal to accept medical assistance was his disability. Jurors crediting the plaintiffs' witnesses could find that Susan and Bertin repeatedly called Giblin's attention to Walter's ability to communicate with eye blinks and his Computer and that Giblin ignored this information. Further, although the telemetry operator was told that Walter could communicate by computer, the operator did not ask on-site personnel to complete the refusal-to-accept-medical-assistance questionnaire with him using these methods. The non-responses of both Lt. Giblin and the telemetry operator could enable a reasonable jury to conclude that they refused because Walter, as a result of his ALS, could not speak although

he could communicate.[8] Further, Bertin testified that she told Giblin that Walter was alert and competent and that Giblin did not controvert her statement. Finally, the questionnaire appended to the Guidelines specifically asks whether the on-site supervisor spoke to the patient, suggesting that such communication is normally a part of the required procedure.

The record also contains direct evidence that Giblin did not evaluate Walter's refusal because Walter could not speak. Bertin testified that she asked Giblin if he would transport Walter if he could speak and that Giblin replied that he would not. The district court held that this statement was ambiguous as Giblin could have meant only that, if Walter could breathe and thus could talk, he would not have transported him. If this interpretation were accepted, the court reasoned, the decision to transport Walter was based on Walter's medical needs rather than on his disability.

The district court's ruling is problematic for three separate reasons. First, Walter's inability to breathe on his own was always present and, like his inability to talk,

8. It is also possible that the telemetry service did not instruct Giblin to evaluate Walter's competence and refusal to accept treatment. Giblin testified that when he arrived on the scene, the crew told him that "they spoke to telemetry, that telemetry told them that since the patient could not speak to them, they could not relay the information back and forth, and they should transport the patient." If the finder of fact credited this testimony, it could find that Walter was denied services because of his disability based on telemetry's instructions.

was caused by his primary disability. Walter could, within the parameters of his disability, have been healthy, and yet unable to breathe on his own or talk. Second, accepting plaintiffs' proof, Walter, despite his inability to breathe or talk, had the essential qualification for access to the city's evaluation system: He could communicate "verbally or non-verbally" that he understood the need for treatment and nevertheless refused it. Therefore, whether Giblin's decision was based on Walter's inability to speak or his inability to breathe, a reasonable fact-finder could find that he was denied the service because of his disability. Third, the district court, on summary judgment should have resolved the ambiguity against Giblin. *E.g.*, *Graham v. Long Island R.R.*, 230 F.3d 34, 38 (2d Cir. 2000).

The City also argues that Bertin's description of Giblin's statement is hearsay. Of course, it is not. Bertin testified to a statement that she personally heard and, because Giblin is a party and spoke within the scope of his employment with another party, the City, the statement is admissible as a party admission against both Giblin and the City. *See* Fed. R. Evid. 801(d)(2)(A), (D).

Finally, the City argues, relying on Anthony, that Giblin's remark, even if admissible, is insufficient to sustain plaintiffs' burden of proof. In Anthony, we rejected a disability discrimination claim, where the proof of discriminatory intent in taking a person with Down Syndrome to a hospital and then hospitalizing her was limited to one officer's statement that "[plaintiff]

'seemed to be needing of assistance because she appeared to be slow.'" 339 F.3d at 141. Anthony is distinguishable in two respects. First, Giblin's statement, unlike that of the defendant in Anthony, was directly linked to the question of why he seized Walter without evaluating his alleged refusal to accept medical assistance. Second, as previously recounted, a great deal of circumstantial evidence supports a finding of discriminatory intent, and in particular an intent based on a stereotypical view of the abilities of a seriously physically handicapped individual. From all of this evidence, a reasonable jury could conclude that Giblin adopted a stereotyped view of Walter's abilities and therefore discriminated. *See* 42 U.S.C. § 12101(a)(7) (finding that "individuals with disabilities . . . have been . . . subjected to a history of purposeful unequal treatment . . . resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society"). Unfortunately persons who are severely physically disabled are often perceived as incompetent. The evidence in this case could support a jury finding that Giblin perceived Walter as incompetent because of Walter's extreme physical disability and therefore denied him the right to use the City's evaluation system. Because a reasonable jury could find that Giblin declined to evaluate Walter's alleged non-verbal and computer-generated indicators of refusal to accept treatment on account of his disability, the district court erred by granting summary judgment dismissing Walter's ADA claim against the City.

Appendix C

St. Luke's

However, we affirm the district court's dismissal of the ADA claim against St. Luke's because it is not a public entity subject to suit under Title II. By statute, a "public entity" is defined as "(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and (C) the National Railroad Passenger Corporation, and any commuter authority." 42 U.S.C. § 12131(1). Plaintiffs contend that St. Luke's is a public entity because in the actions under review in this lawsuit, it carried out a public function pursuant to a contract with the City, in accord with City rules, and under the direction of City employees. Plaintiffs fail, however, to grapple with the actual words of the statute.

"Statutory analysis begins with the text and its plain meaning, if it has one." *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 337 (2d Cir. 2006). Only if an attempt to discern the plain meaning fails because the statute is ambiguous, do we resort to canons of construction. *Id.* at 337. If both the plain language and the canons of construction fail to resolve the ambiguity, we turn to the legislative history. *Id.* at 338.

In parsing the statute, we note that it is clear that St. Luke's, a private hospital, is not (1) a state or local government, (2) a department, agency, or special purpose district of a state or local government, or (3) the National Railroad Passenger Corporation or a

commuter authority. Therefore, we are left to determine whether "instrumentality," 42 U.S.C. § 12131(1)(B), was meant to include private hospitals that contract with a municipality to provide services.[9]

One relevant canon of construction is that in searching for the meaning Congress intended, we consider the context in which a particular word occurs because a statutory term "gathers meaning from the words around it." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307, 81 S. Ct. 1579, 6 L. Ed. 2d 859, 1961-2 C.B. 254 (1961). Although "[t]he maxim noscitur a sociis, that a word is known by the company it keeps, [is] not an inescapable rule, [it] is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Id.*

"Instrumentality," like "discovery," the word considered in Jarecki, is a word susceptible of more than one meaning and is therefore potentially ambiguous. It may, for instance, mean "something by which an end is achieved." Websters Third New International Dictionary 1172 (Philip Babcock Grove ed., 1993). But, it may also mean "a part, organ, or subsidiary branch, esp. of a governing body." *Id.* The former meaning supports the conclusion that a hospital that contracts with a municipality to provide services is an instrumentality, while the latter suggests that to be an instrumentality, an entity must somehow belong to the government or have been created by it.

9. The regulation defining "public entity," 28 C.F.R. § 35.104, does not further define "instrumentality," and therefore does not aid us in our task.

Appendix C

Because of the "company ['instrumentality'] keeps," *Jarecki*, 367 U.S. at 307, we hold that Congress intended the latter meaning. "Instrumentality," is one of a string of words that includes "agency," "department," and "special purpose district." All of the words in this string are qualified by "of a State or States or local government." Agencies and departments are units of a governmental entity while a special purpose district, at least in New York, is understood to mean a district set up by a municipality to serve certain needs such as sewer, drainage, parking, and the like. *See* N.Y. Town L. § 190; *Collins v. Town of Goshen*, 635 F.2d 954, 955-56 (2d Cir. 1980). Each of the entities listed other than "instrumentalities" is thus a creature of the municipality or state whose ends it serves. We therefore conclude that "instrumentality" is likewise best read as referring to a creature of a state or municipality. A private hospital performing services pursuant to a contract with a municipality even if it does so according to the municipality's rules and under its direction, is not a creature of any governmental entity. Instead it is a parallel private entity. Because St. Luke's is a private, and not a public, entity, the district court correctly dismissed the ADA claim against St. Luke's.[10]

10. The same result would be achieved through application of ejusdem generis, "a rule of statutory construction that provides that when general words follow the enumeration of particular classes, the general words should be construed as applying only to things of the same general class as those enumerated." *Samuels, Kramer & Co. v. Commissioner*, 930 F.2d 975, 980 n.2 (2d Cir. 1991).

We note that the parties have not called our attention to—and our research has not revealed—any canon of construction or legislative history that would require a different result. We also note that, although precedent on this issue is sparse, the Eleventh Circuit has held that a hospice in receipt of federal funds was not a public entity. *See Schiavo ex rel Schindler v. Schiavo*, 403 F.3d 1289, 1293, App. at 1299 (11th Cir. 2005) (per curiam).

II. Section 1983.

Plaintiffs' Section 1983 claims were somewhat loosely pleaded. Nevertheless, we accept the magistrate judge's conclusion that Walter alleged violations of his Fourth Amendment right to be free of unreasonable seizures and excessive force and his Fourteenth Amendment right to refuse medical treatment because no party quarrels with that characterization. We also assume for the sake of this analysis that Susan made excessive-force and wrongful-detention claims. As with Walter's ADA claims, the Section 1983 claims are made against each of the three defendants: Giblin, the City, and St. Luke's. In addition to arguing that the plaintiffs failed to allege the deprivation of a cognizable constitutional right, each defendant makes arguments particular to that defendant's situation. We therefore again treat each defendant separately.

Appendix C

The City

For the purpose of Section 1983, a municipality is not vicariously liable for the acts of its employees. *Coon v. Town of Springfield*, 404 F.3d 683, 686-87 (2d Cir. 2005)(*citing Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)). Although there are several different ways of establishing municipal liability under Section 1983, the two relevant to this case are proving that (1) the municipality is aware that its policy for handling a given situation, although not unconstitutional in itself, may be applied unconstitutionally, but nevertheless consciously chooses not to train its employees in proper application of the policy; or (2) the municipality's practice, as opposed to its formal policy, is to engage in the constitutional violation at issue. *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 125-26 (2d Cir. 2004).

Plaintiffs contend that lack of knowledge of the City's official policy for evaluating refusals to accept medical treatment from non-verbal individuals was so widespread as to amount to an official unwritten policy not to evaluate such refusals. Alternatively, plaintiffs argue that the City is liable for its failure to train emergency personnel in the evaluation of treatment refusals by non-verbal persons.

A Section 1983 action may be maintained based on a practice that "was so 'persistent or widespread' as to constitute 'a custom or usage with the force of law.'" *Patterson v. County of Oneida*, 375 F.3d 206, 226 (2d

Cir. 2004) (*quoting Sorlucco v. N.Y. City Police Dep't*, 971 F.2d 864, 870 (2d Cir. 1992)). The alleged custom or practice need not be embodied in a rule or regulation. *Kern v. City of Rochester*, 93 F.3d 38, 44 (2d Cir. 1996). However, the alleged practice "must be so manifest as to imply the constructive acquiescence of senior policy-making officials." *Sorlucco*, 971 F.2d at 871.

Failure to train subordinate municipal employees will trigger municipal liability "only where the failure to train amounts to deliberate indifference to the rights" of members of the public with whom the employees will interact. *City of Canton v. Harris*, 489 U.S. 378, 388, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989). In some cases, such as the use of deadly force, the risk to the public is so obvious and so great that failure to train on the applicable constitutional limitations constitutes deliberate indifference as a matter of law. *Id.* at 390 & n.10. In addition, where municipal employees "in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers," deliberate indifference will be found.

Id. at 390 n.10.

We have described three requirements for showing that a lack of training manifests deliberate indifference. *See Walker v. City of New York*, 974 F.2d 293, 297-98 (2d Cir. 1992). First, to reach the jury, the plaintiff must offer evidence from which a reasonable jury could conclude "that a policy-maker knows 'to a moral certainty' that

her employees will confront a given situation." *Id.* at 297 (quoting *City of Canton*, 489 U.S. at 390 n.10). Next, "the plaintiff must show that the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation." *Walker*, 974 F.2d at 297. "Finally, the plaintiff must show that the wrong choice by the city employee will frequently cause the deprivation of a citizen's constitutional rights." *Id.* at 298. In addition, at the summary judgment stage, plaintiffs must "identify a specific deficiency in the city's training program and establish that that deficiency is closely related to the ultimate injury, such that it actually caused the constitutional deprivation." *Amnesty Am.*, 361 F.3d at 129 (internal quotation marks omitted).

As direct evidence in support of both its theories of municipal liability, plaintiffs rely on testimony that "[n]either defendant Giblin, nor any of the EMS staff knew the protocol for assessing a person's competence to refuse medical aid, had copies of the guidelines at hand or in memory, or could recall receiving training in these protocols." However, despite discovery, plaintiffs point to no other instance in which City personnel failed to properly evaluate a non-verbal individual's refusal to accept medical treatment.

To support the failure-to-train claim, plaintiffs also rely on a series of inferences. They first point to the congressional findings for the ADA, in which Congress estimated that over 43 million Americans suffer from

some sort of disability. *See* 42 U.S.C. § 12101(a)(1). Next, they argue that a significant percentage of these disabled persons suffer from some sort of communications disability. From that assumption, they posit that "[i]t is not unreasonable to conclude that multiple thousands of New Yorkers are affected with some sort of communications disability and that EMS staff will frequently confront situations in which they will be forced to assist persons suffering from some form of communications disability." Finally, they argue that had the officers been provided with simpler and clearer guidelines or offered training, they would more likely have made the constitutionally correct decision with respect to Walter's refusal to accept treatment.

Plaintiffs have not offered sufficient evidence of a widespread custom and practice to reach the jury. A reasonable jury could not find that evidence of one instance in which emergency personnel were not familiar with the correct protocol constituted a practice "so manifest as to imply the constructive acquiescence of senior policy-making officials." *Sorlucco*, 971 F.2d at 871.

We also conclude that plaintiffs offered insufficient evidence to reach the jury on a failure-to-train theory; however, this issue is closer. Although plaintiffs offered no evidence of the number of people in New York who are disabled by their inability to communicate verbally, it is likely true, given the City's enormous population, that there are a substantial number of such people and that a significant subset of that population will, at some

point in their lives, experience medical emergencies potentially calling for transportation to a medical facility. Further, emergency medical personnel who respond to a medical emergency involving a person who refuses to accept medical treatment do face a difficult choice between honoring the person's refusal and offering treatment or transportation for treatment that they feel is necessary. Because medical professionals are trained to heal, absent proper training, they may well believe they should override the ill or injured person's refusal. Finally, proper training would increase the likelihood of a constitutionally appropriate response. *But see Walker*, 974 F.2d at 297 ("[A] policymaker does not exhibit deliberate indifference by failing to train employees for rare or unforeseen events.").

Two factors, however, cause us to conclude that a reasonable jury could not find for plaintiffs on a failure-to-train theory. First, despite the likelihood of a significant problem, there is no admissible evidence in the record of any problem. Second, and more important, the City did not fail to fulfill any training obligation it may have had. It provided personnel with guidelines that specifically and clearly informed them that they had to evaluate non-verbal refusals of medical treatment. Without evidence that these provisions were ignored prior to the incident at issue in this lawsuit, a reasonable jury could not find that the City had a further training obligation. Therefore, the district court correctly dismissed all Section 1983 claims against the City.

Appendix C

St. Luke's

St. Luke's also is not vicariously liable for any constitutional torts that its employees may have committed. *See Rojas v. Alexander's Dep't Store, Inc.*, 924 F.2d 406, 408 (2d Cir. 1990). As with the City, plaintiffs offer no evidence suggesting that St. Luke's had an unwritten policy that triggered the asserted violation of Walter's or Susan's constitutional rights. Further, the Greens have offered no facts supporting a failure-to-train claim. To the extent that they implicitly rely on the inferences raised in support of the failure-to-train claim against the City, their effort fails a fortiori. Because any inference that can be drawn as to the number of communications-disabled persons who reside in the City is diminished by the percentage of those persons outside St. Luke's service area, the inference is far weaker than it would be in the case of the City.[11]

Giblin

In addition to arguing that plaintiffs' Section 1983 claims against him should be rejected on the merits, Giblin contends that he would, in any case, be entitled to qualified immunity.[12] The defense of qualified immunity and the

11. Having determined that St. Luke's is not liable under Section 1983 because plaintiffs fail to offer evidence in support of any theory of employer liability, we need not reach St. Luke's alternative argument—that it did not act under color of state law.

12. Giblin contends that plaintiffs waived any argument that Giblin was not entitled to qualified immunity on their

(Cont'd)

merits of the alleged constitutional violations are intertwined because the first step in a qualified immunity analysis is determining "in the light most favorable to the party asserting the injury, [if] the facts alleged show the [defendant's] conduct violated a constitutional right." *Saucier*, 533 U.S. at 201. If the plaintiff has offered sufficient evidence that his constitutional rights were violated, the inquiry then turns to whether the right in question was clearly established at the time of the alleged violation. *Pena v. DePrisco*, 432 F.3d 98, 107 (2d Cir. 2005). If the right was not clearly established, the defendant is not liable even if his actions did violate plaintiffs' constitutional rights. *See Saucier*, 533 U.S. at 206.

We examine first Walter's claim that Giblin, by directing Walter's removal from his apartment and transport to the hospital, violated Walter's Fourth Amendment right to be free of an unreasonable seizure. In *Glass v. Mayas*, 984 F.2d 55 (2d Cir. 1993), we analyzed the right of an individual to be free of a seizure necessary to secure his involuntary psychiatric hospitalization. *Id.* at 58. Although we ultimately held that the defendants were entitled to qualified immunity because a reasonable officer could have concluded

---

(Cont'd)

constitutional claims by not raising the argument in their opening brief. There was no waiver. The district court determined that Giblin was entitled to qualified immunity because no constitutional violation occurred. *See Green*, 2004 U.S. Dist. LEXIS 1414, slip. op. at 24. Plaintiffs fully explored the issue of whether a constitutional violation occurred in their opening brief.

plaintiff was dangerous, we first held that in order to constitutionally seize a person to transport him to a hospital, the person must be dangerous, presumably to himself or others. *Id.* For a competent adult, dangerousness to oneself justifying such a seizure does not include a refusal to accept medical treatment. *See Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990).

Giblin posits that Walter was in danger because he was not competent to refuse treatment and because he was "in extremis." The jury may find in Giblin's favor on this issue. However, there is substantial evidence to suggest that Walter was neither incompetent nor in extremis. Susan and Walter both testified that Walter communicated extensively about his wish not to go to the hospital. St. Luke's employee Collins told the telemetry operator that Walter could communicate by computer, and an EMS note indicates that Walter was communicating by blinks and computer. Further, Bertin testified that Walter was alert and actively communicating when she arrived, and both Bertin and Susan testified that they repeatedly requested that Giblin talk to Walter and ask him questions. It is uncontested that Giblin never attempted to assess Walter's competence.

Supporting the notion that Walter was not in extremis is Susan's testimony that his oxygen levels had returned to a level that was good for him as well as the fact that he was breathing. Although he was not breathing on his own, he never breathed on his own.

The only difference in Walter's breathing at that time from his normal state of breathing was that he was being assisted by human beings rather than by a machine. There was no testimony or evidence that the ambu-bagging was not succeeding or that it was likely to fail before Hill arrived. If the Greens' version of events is accepted by the jury, Walter's right to remain free of an unreasonable seizure was violated.

We turn now to qualified immunity. Giblin is entitled to qualified immunity for the seizure he directed unless (1) Walter's constitutional right to be free from seizure was clearly established, and (2) it was objectively unreasonable for Giblin to believe that his conduct did not violate Walter's rights. *See Anthony*, 339 F.3d at 138 (2d Cir. 2003). An officer's choices must be viewed as objectively reasonable unless "no officer of reasonable competence could have made the same choice in similar circumstances." *Lennon v. Miller*, 66 F.3d 416, 420-21 (2d Cir. 1995). If there is a material question of fact as to the relevant surrounding circumstances, the question of objective reasonableness is for the jury. *Kerman v. City of New York*, 374 F.3d 93, 109 (2d Cir. 2004). If there is no material question of fact, the court decides the qualified immunity issue as a matter of law. *Id.*

We hold that it was clearly established at the time of the incident under review that a competent adult could not be seized and transported for treatment unless she presented a danger to herself or others. *See Glass*, 984 F.2d at 57. Thus, to grant summary judgment, the district court was required to (1) adopt the evidence in

the record most favorable to plaintiffs, yet (2) hold that a reasonable officer could have perceived Walter as incompetent or a danger to himself or others.[13]

Giblin's justification for having ordered Walter's seizure was that (1) the paramedics at the scene told him Walter was not oriented; and (2) Walter appeared to be in extremis. Whether or not Walter was in extremis, the officers could not have seized him if he competently and voluntarily declined treatment. *See Cruzan*, 497 U.S. at 278. Further, significant evidence suggests that Giblin's claim that he was informed Walter was not oriented was inaccurate. First, the EMS note stated that Walter was conscious and communicating. Second, St. Luke's paramedic Chris Collins testified that within twenty minutes of his arrival at the Greens' apartment, Walter had gone from a Glasgow Coma Score ("GCS") of three, which indicates unconsciousness, to a GCS of fifteen. The Glasgow Coma Scale tests whether a person is oriented to time, place, and person. Fifteen is the highest (most aware) score possible on the GCS.

Under these conditions, a reasonable jury could conclude that the paramedics at the scene knew that Walter was alert and oriented and were unlikely to have informed Giblin that Walter was not oriented. A reasonable jury could also conclude that the information

---

13. Dangerousness to one's self cannot be read to include a competent adult's right to refuse treatment because competent adults have a well-established right to refuse medical treatment. *Cruzan*, 497 U.S. at 278.

known to the paramedics was reasonably available to Giblin and/or that Giblin could have asked Walter a series of simple questions to determine his competence. Therefore, the jury could conclude that, based on information readily available to Giblin, no reasonable officer would have concluded that Walter was incompetent to make decisions concerning his treatment or a threat to himself or others. *See Kerman v. City of New York*, 261 F.3d 229, 241 (2d Cir. 2001) (holding that an officer's failure to question knowledgeable and readily available persons concerning basis for plaintiff's seizure would enable a reasonable fact-finder to conclude "that the police acted outside the bounds of both the Fourth Amendment and the qualified immunity standards of objective reasonableness in placing [plaintiff] in restraints for his eventual transport"). We conclude that there are factual issues relevant to qualified immunity on Walter's Fourth Amendment seizure claim against Giblin and therefore reverse the district court's dismissal of this claim.

Having found issues of fact on the Fourth Amendment seizure claim, we have little difficulty concluding that we must also vacate dismissal of the Fourth Amendment excessive-force claim because that dismissal rested on the district court's conclusion that the force was no greater than required to seize Walter.

We turn next to Walter's Fourteenth Amendment claim. The district court dismissed this claim after holding that the chaotic and crisis-laden situation in the Green household would cause a reasonable officer to

believe that Walter could not make a competent decision concerning his care and that he needed to be removed to a calmer atmosphere in order to make a decision. *See Green*, 2004 U.S. Dist. LEXIS 1414, slip op. at 23. We affirm the district court's decision but disagree with its rationale.

Over fifteen years ago, the Supreme Court recognized "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment." *Cruzan*, 497 U.S. at 278. The Cruzan court added: "whether [an individual's] constitutional rights have been violated must be determined by balancing [this] liberty interest[] against the relevant state interests." *Id.* at 279 (internal quotation marks omitted).

As we must, we address first whether Giblin violated Walter's constitutional right to refuse treatment by transporting him to the hospital. We frame the issue in this narrow fashion because there is no evidence in the record that Walter objected to the medical treatment given to him in the apartment or to the treatment he eventually received in the hospital. Rather, Walter objected only to being taken to the hospital. We do not believe that the mere act of transporting a person to the hospital constitutes treatment. Rather, this action is more properly considered as a seizure under the rubric of the Fourth Amendment. Therefore, we hold that the district court properly dismissed Walter's Fourteenth Amendment claim against Giblin.

Appendix C

We turn finally to Susan's Section 1983 claims. Susan waived her false imprisonment claim by failing to press it on appeal. *See Mitchell v. Fishbein*, 377 F.3d 157, 164 (2d Cir. 2004). With respect to Lieutenant Giblin, the only remaining potential Section 1983 defendant, Susan's excessive-force claim also fails because there is no evidence that Giblin used any force against Susan.

III. State law claims.

In addition to claiming discrimination in violation of the ADA, Walter claimed that defendants violated his right to be free of discrimination pursuant to the HRL. Section 296(2)(a) of the New York Executive Law provides:

> It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent, or employee of any place of public accommodation . . . because of the . . . disability . . . of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof.

Section 292(9) of the Executive Law defines "place of public accommodation" to include "hospitals" and "all public conveyances."

The district court dismissed Walter's HRL claim on the same basis that it dismissed the ADA claim, that is,

that there was no basis for finding that either St. Luke's or the City discriminated. We vacate that determination with respect to the City because we have found sufficient evidence of discrimination.

We affirmed the district court's dismissal of Walter's ADA claims against St. Luke's and Giblin because they are not public entities within the meaning of Title II of the ADA. Because the HRL does not have a parallel requirement and applies to at least some individuals, *see Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313, 1317 (2d Cir. 1995), abrogated on other grounds, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998), we cannot affirm dismissal of the HRL claim on this ground. While other grounds for dismissal of the HRL claim against Giblin or St. Luke's may exist, they have not been argued. We therefore also reinstate the HRL claims against St. Luke's and Giblin. St. Luke's and Giblin remain free to raise alternative grounds in district court.

Plaintiffs' claims of negligence rest on St. Luke's and the City's alleged failure to train their employees. As noted previously, the plaintiffs have failed to provide any evidence from which a reasonable jury could find that St. Luke's or the City had notice of a problem that required additional training. Therefore, the dismissal must be affirmed.

St. Luke's argues that all of the plaintiffs' intentional-tort claims should be barred against it because plaintiffs did not add St. Luke's as a defendant

until July 2001, more than a year after the March 2000 incident. New York Civil Practice Law and Rules § 215(3) provides a one-year statute of limitations for intentional torts. However, plaintiffs argue that their claims should relate back pursuant to Federal Rule of Civil Procedure 15(c) because "the claim . . . asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading," *id.* § 15(c)(2). Plaintiffs' argument is not sound because St. Luke's lacked notice of the lawsuit against the City. *See Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 149 n.3, 104 S. Ct. 1723, 80 L. Ed. 2d 196 (1984) (per curiam)("The rationale of Rule 15(c) is that a party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitations were intended to provide."). Because plaintiffs did not give notice of their intentional-tort claims to St. Luke's during the statutory period, the district court properly dismissed these claims.

Remaining are plaintiffs' intentional-tort claims against the City. As noted previously, Susan has abandoned her false-imprisonment claim. We therefore turn to the Greens' assault and battery claims. A New York employer, such as the City, is liable for intentional torts, such as assault and battery, committed by its employees provided that the tort is committed within the scope of the plaintiff's employment. *See, e.g., Carnegie v. J.P. Phillips, Inc.*, 28 A.D.3d 599, 815 N.Y.S.2d 107, 108-09 (2d Dep't 2006). Because the City does not argue that its officers acted outside the scope

of their employment, we need only examine whether the conduct alleged by plaintiffs falls within the New York definition of assault and battery. New York defines "assault" as "an intentional placing of another person in fear of imminent harmful or offensive contact" and "civil battery [as] an intentional wrongful physical contact with another person without consent." *Charkhy v. Altman*, 252 A.D.2d 413, 678 N.Y.S.2d 40, 41 (1st Dep't 1998)(internal quotation marks omitted). Susan did not make allegations sufficient to claim either assault or battery because she did not testify that a city employee intentionally touched her without privilege or that an officer acted in a way that placed her "in fear of imminent harmful or offensive conduct." Therefore, the district court correctly dismissed Susan's assault and battery claims. However, both Alixandra and Walter claimed that officers did touch them without their permission and in an offensive manner. The district court was correct that Alixandra's injury was minor. However, seriousness of the injury does not appear to be an element of a New York assault claim, and we have found issues of fact as to the reasonableness of the seizure. Therefore, neither of the district court's bases for dismissing the assault and battery claims is sustainable.

Appendix C

CONCLUSION

We affirm the judgment of the district court insofar as it (1) dismissed Walter's ADA claims against St. Luke's and Giblin; (2) dismissed all Section 1983 claims against the City and St. Luke's; (3) dismissed Susan's false-imprisonment and assault claims as well as her Section 1983 claims against Giblin and the City; (4) dismissed negligence claims against all defendants; (5) dismissed all intentional tort claims made against St. Luke's; and (5) dismissed Walter's Fourteenth Amendment/Section 1983 claim against Giblin. As to all other claims, we vacate and remand for further proceedings not inconsistent with this opinion.

APPENDIX D — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DECIDED FEBRUARY 3, 2004 AND FILED FEBRUARY 4, 2004

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

01 Civ. 1996 (RMB) (GWG)

WALTER GREEN, SUSAN ROSS GREEN, and ALIXANDRA GREEN, as infant by her mother and natural guardian, SUSAN ROSS GREEN,

Plaintiffs,

-against-

THE CITY OF NEW YORK, PAUL GIBLIN, and ST. LUKE'S-ROOSEVELT HOSPITAL CENTER,

Defendants.

February 3, 2004, Decided
February 4, 2004, Filed

JUDGES: RICHARD M. BERMAN, U.S.D.J.

OPINION BY: RICHARD M. BERMAN

Appendix D

OPINION

DECISION AND ORDER

I. Background

On or about July 12, 2001, Walter Green, Susan Ross Green, and Alixandra Green ("Greens" or "Plaintiffs") filed an amended complaint ("Amended Complaint") alleging, among other things, that the City of New York, Paul Giblin, a lieutenant with the New York City Emergency Medical Services ("City Defendants") and St. Luke's-Roosevelt Hospital Center ("St. Luke's") unlawfully removed Walter Green from his home in Manhattan on March 19, 2000, after the EMS was summoned by Alixandra Green. Amended Complaint at 4-15. Mr. Green suffered from Amyotrophic Lateral Sclerosis ("ALS"), also known as Lou Gehrig's Disease, at the time and was experiencing serious respiratory difficulty. *Id.* He was taken by EMS to St. Luke's, where he remained for two days (and was diagnosed as having pneumonia) before being transferred to Columbia Presbyterian Hospital, which has a unit dedicated to ALS patients, for an additional three days.[1] *Id.* Defendants are alleged in the Amended Complaint to have violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 1983, and the New York State

1. Mr. Green died on December 9, 2001 from ALS complications, i.e. twenty-one months after this incident. Susan Ross Green is his widow and the administrator of his estate and Alixandra Green is their daughter. *See* Letter from Plaintiffs, dated Dec. 10, 2001; Amended Complaint at 3.

Appendix D

Human Rights Law; to have committed assault and battery against Walter, Susan and Alixandra Green and the false imprisonment of Walter and Susan Green. Amended Complaint at 15-18, 20-21. It is also alleged that the City of New York and St. Luke's were negligent for failing properly to train and supervise their employees. Amended Complaint at 18-19.

Defendants assert that they acted appropriately, i.e. they were responding to Plaintiffs' call for emergency assistance and found Mr. Green to be "unconscious as the result of a mechanical ventilator failure." Defendants' Memorandum of Law, dated June 30, 2003 ("Defs' Memo"), at 2.

On July 23, 2003, Defendants filed a motion for summary judgment ("Motion") accompanied by a memorandum of law. On August 1, 2003, Plaintiffs submitted an opposition ("Pls' Memo"). On August 14, 2003, Defendants submitted a reply ("Reply").

On January 5, 2004, United States Magistrate Judge Gabriel W. Gorenstein, to whom this matter had been referred, issued a comprehensive and thoughtful Report and Recommendation ("Report") recommending that Defendants' Motion be granted and the case dismissed because, among other things, "the decision to treat Mr. Green was not based in his inability to talk but rather was based on Giblin's perception that Walter Green 'was in extremis, and he needed to go to the hospital because he could not breathe for himself.'" Report at 16. The Report goes on to say that Plaintiffs have not presented

any evidence upon which a reasonable jury could base a determination "that any of the officers acted unreasonably . . . in bringing Mr. Green to a hospital where his condition could be properly treated and stabilized," or to support the contention that "Giblin or any of the other officers acted unreasonably in using whatever force was necessary to effectuate Mr. Green's transport to the hospital." Report at 22-24. Plaintiffs failed to show "the existence of a City policy not to provide services to those unable to speak." Report at 26. And, no claim was stated against St. Luke's because "vicarious liability is not available in a § 1983 suit." Report at 28. Magistrate Judge Gorenstein also found that there was no evidence to support the Greens' false imprisonment claims or the assault and battery claims. Report at 29-30, 32-35.

The Report advised that "pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties have ten (10) days from the service of this Report and Recommendation to file any objections." Report at 36. Plaintiffs submitted objections on January 26, 2004 ("Objections"). **For the reasons set forth below, the Court adopts the Report in its entirety.**

II. Standard of Review

The Court may adopt those portions of a magistrate judge's report to which no objections have been made and which are not facially erroneous. *See* Fed. R. Civ. P. 72(b); *Pizarro v. Bartlett*, 776 F. Supp. 815, 817 (S.D.N.Y.

1991); *Nelson v. Smith*, 618 F. Supp. 1186, 1189 (S.D.N.Y. 1985). The court conducts a de novo review of those portions of the report to which objections have been made. *Pizarro*, 776 F. Supp. at 817. Once objections have been made, a district judge may accept, reject, or modify, in whole or in part, the findings and recommendations of the magistrate judge. *Deluca v. Lord*, 858 F. Supp. 1330, 1345 (S.D.N.Y. 1994); *Walker v. Hood*, 679 F. Supp. 372, 374 (S.D.N.Y. 1988).

III. Analysis

The facts as set forth in the Report are incorporated herein unless otherwise noted.

The Court has conducted a *de novo* review of, among other things, the record, the Report, Plaintiffs' Objections, and applicable legal authorities, and concludes that Magistrate Judge Gorenstein's legal and factual determinations are supported by the record and the law in all respects. Plaintiffs' Objections raise substantially the same arguments that were presented to the Magistrate and, in any event, do not provide a basis for departing from the Report's recommendations.[2]

2. As to any portions of the Report to which no objections have been made, the Court concludes that the Report is not clearly erroneous. *See Pizarro*, 776 F. Supp. at 817. Any Objections that are not specifically discussed in this Order have been considered de novo and rejected.

Appendix D

Plaintiffs' principal Objection is that Magistrate Judge Gorenstein misapplied the ADA, as "plaintiffs have presented direct evidence of intentional discrimination by defendants such that but for his disability Walter Green would have been allowed to refuse treatment and remain in his home," Objections at 8, and incorrectly found that "a reasonable accommodation to plaintiff's disability would have been an 'undue hardship, constituting a fundamental alteration in the nature of the services defendants provided." Objections at 19.

Magistrate Judge Gorenstein correctly found that the evidence presented by Plaintiffs is insufficient, as a matter of law, to permit the action to continue and to support Plaintiffs' claim that Walter Green was discriminated against because of his inability to speak. *See* Report at 19; *Anthony v. City of New York*, 339 F.3d 129, 141 (2d Cir. 2003) ("There is no evidence ... that the seizure and hospitalization were motivated by discrimination against individuals with disabilities."); *Herschaft v. N.Y. Bd. of Elections*, 2001 U.S. Dist. LEXIS 11801, No. 00 Civ. 2748, 2001 WL 940923, at *5 (E.D.N.Y. Aug. 13, 2001), *aff'd* 37 Fed. Appx. 17, 2002 WL 1225107 (2d Cir. May 13, 2002) ("It is not clear to the Court that plaintiff can show that he is being excluded from participating ... by reason of his disability, as is necessary under the ADA."). Rather, "the evidence points inexorably to the conclusion that the officers perceived that Walter Green's condition required urgent medical attention - regardless of Mr. Green's or his family's statements that he did not wish to be

hospitalized." Report at 18. When Defendants made the decision to transport Mr. Green to the hospital, "he was unable to breathe independently of a ventilator . . . . Neither of the mechanical ventilators were working, [and he] had lost consciousness for some time . . . . During the time the crews were in the Greens' apartment, the mechanical ventilators were not fixed and Mr. Green could only breathe if someone was manually pumping oxygen into his trachea." Report at 17-18.

Under these circumstances, the evidence shows that "the decision to treat Mr. Green was not based on his inability to talk but was based on [Defendants'] perception that Walter Green 'was in extremis, and he needed to go to a hospital because he could not breathe for himself." Report at 16. Indeed, the Court concludes that Defendants may have subjected themselves to liability had they not acted as they did.

IV. Conclusion

The Court adopts Magistrate Judge Gorenstein's Report in its entirety, and, for the reasons stated herein and therein, dismisses the Complaint with prejudice. The Clerk of the Court is respectfully requested to close this case.

Dated: February 3, 2004

RICHARD M. BERMAN, U.S.D.J.

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED FEBRUARY 23, 2010

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 23rd day of February, two thousand and ten.

(07-4027-cv)

SUSAN ROSS GREEN, Executrix of the Estate of Walter Green, deceased,

Plaintiff-Appellant,

-v-

CITY OF NEW YORK and PAUL GIBLIN,

Defendants-Appellees.

Appellees City of New York and Paul Giblin having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

Appendix E

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
s/ Catherine O'Hagan Wolfe